Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

JERRY GODBY,
Petitioner

v.

ELECTROLUX CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Jerry Godby, Pro Se
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Alpharetta, GA 30201
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142 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court and Court of Appeals' granting of summary judgment to Respondent directly conflicts with the Supreme Court's decision in St. Mary's Honor Center v. Hicks, ____ U.S. ____, 113 S.Ct. 2742 (1993) made credibility determinations and drew improper inferences on material and disputed factual issues in favor of the Respondent and therefore improperly granted summary judgment; and

2. Whether the shifting and inconsistent reasons articulated by Respondent for Petitioner's termination create genuine issues of material fact which preclude summary judgment under St. Mary's Honor Center v. Hicks, supra.

3. Whether Respondent Electrolux waited seven months to fire Petitioner for his protest against the illegal acts of a company officer because the company feared a lawsuit was imminent from Petitioner's wife if they acted sooner.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14 of the Supreme Court Rules, Petitioner hereby submits a complete list of the trial judge, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this litigation, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to the parties.

a. Steven D. Cooper, Esq., Attorney for Respondent

b. Electrolux Corporation, Respondent

c. Orinda D. Evans, Judge, United States District Court

d. Jerry Godby, Petitioner

e. Gary R. Kessler, former Attorney for Petitioner

f. Christopher E. Parker, former Attorney for Petitioner

g. Marc A. Taylor, Attorney for Respondent

h. Kathleen A. Wasch Attorney for Respondent

i. John F. Wymer, III, Attorney for Respondent

Respectfully submitted this _____ day of January, 1996.

_____

JERRY GODBY, PRO SE

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STATEMENT OF THE CASE

A. Jurisdiction, Course of Proceedings and Disposition in the Court Below and By This Court

Petitioner Jerry Godby ("Godby") filed a timely appeal to the Eleventh Circuit Court of Appeals of an order of the United States District Court for the Northern District of Georgia (Evans, Judge) granting Respondent's ("Electrolux") motion for summary judgment. Godby brought this action alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981(A) ("Title VII") and the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq ("ADEA"). Jurisdiction is pursuant to federal question jurisdiction under 28 U.S.C. § 1331.

Following the timely submission of briefs in this matter, the Court of Appeals, on May 30, 1995, issued a written order, affirming the granting of summary of summary judgment by the court below. On June 20, 1995, Godby filed a timely Petition For Rehearing And Rehearing En Banc. That Petition was denied without an opinion on August 9, 1995.

B. Summary of Disputed Material Facts

The material factual disputes in this matter which should preclude the granting of summary judgment are as follows:

1. Throughout the Summer of 1991, eight (8) Electrolux managers questioned Godby about the tape recording of his wife's boss (Luisi) who indisputably discriminated against Mrs. Godby. I Godby Dep. pp. 61-63. Malone (Vice President Human Resources) threatened Godby that it was "against the law" to record

Luisi's statements and stated that Luisi could sue the Godbys for taping his telephone conversation. I Godby Dep., p. 62. Godby was threatened on two occasions by Cooper (Vice President and General Counsel) regarding a lawsuit if Godby's wife kept pursuing the matter, once in September and once in November 1991.

2. In early November 1991, Godby received his worst performance evaluation in twenty-two years, even though he greatly exceeded his 1991 goals. Horigan Dep. pp. 63-65;

3. Electrolux has stated three (3) conflicting reasons for Godby's discharge:

(a) Economic (Malone Dep., Ex. 8; R-3-34-Ex.C);

(b) Performance (Electrolux Summary Judgment Brief, pp. 20-21); and

(c) Horigan "had enough" of Godby as a result of Godby's December 10, 1991 letter. (Electrolux Eleventh Circuit Brief p. 25).

4. Electrolux's selection of Godby's job for elimination (in contrast to dozens of other jobs was accomplished without the use of any criteria or guidelines).

These disputed facts suggest that Electrolux's stated reasons for Godby's discharge (whatever the reason) are plain and simple pretext.

C. Statement of Facts

On February 10, 1992, and after twenty-two (22) years of employment with Electrolux, Godby was discharged. Godby was an Administrative Services Manager with Electrolux and was told that he was discharged to help "control overhead expenses." R-3-34-Ex. C. Godby's position was eliminated

slightly more than seven (7) months after Godby's wife, also an Electrolux employee, was told by her then superior, Rich Luisi, that she could not return to her former position with Electrolux because he did not want someone working for him who either had "a baby" or would ". . . be in a wheelchair." Luisi Dep., Exs. 2 and 3; P. Godby, p. 25, Ex.1. Within days after Luisi had this telephone conversation with his wife, which she recorded, Jerry Godby reported this conduct to Electrolux's Southeast Area Administrator, Dick White. I Godby Dep. p. 61, White Dep. p. 12.

Godby was then interrogated by eight (8) members of management regarding his wife's tape recording of Luisi. Three (3) months later, in November 1991, even though he had satisfied his superior's performance goals for

1991, Godby received a marginal/competent performance evaluation, his lowest ever. I Godby Dep. pp. 159-160; Horigan Dep. pp. 63-64; Novak Dep. pp. 47-48. This evaluation came on the heels of Godby having received recognition for a "Job Well Done" from Mr. Tom Albani (President and Chief Executive Officer) on October 3, 1991. Both Mr. Albani and Mr. Ed Schwartz (Vice President and Chief Financial Officer) had on a number of occasions in 1991 offered words of appreciation to Godby for his dedication to duty throughout the company's financial crisis. Moreover, on this occasion Mr. Albani presented his appreciation in writing. Some exerts from the memorandum are . . .

"Your commitment, loyalty and dedication are attributes that contribute to the success of the Electrolux Corporation. We are proud

to have a person of your special status on our team.... We are pleased that you have and will continue to have a significant role in the future of Electrolux.... thank you for your continued support.....Very Sincerely, Thomas J. Albani"

Godby was then discharged on February 10, 1992, four months later. Electrolux has articulated three (3) differing reasons for Godby's discharge:

(1) Economic reduction-in-force (Malone Dep., Ex. 8; R-3-34 Ex. C);

(2) Performance. See Appellee's Summary Judgment Brief, pp. 20-26, R-4-46-28; and

(3) Horigan's reaction to Godby's December 10, 1991 memo. See Appellee's Appeals Brief, p. 25.

If Electrolux had been consistent in their explanation for Godby's termination, in all likelihood, this lawsuit would have never been brought. Different and unequal treatment occurred, however, as did shifting explanations for discharge. In Godby's view, when read against the background of St. Mary's Honor Center v. Hicks, ____ U.S. ___ , 113 S.Ct. 2742 (1993) and Sweat v. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983), it is clear that summary judgment was inappropriate in this matter.

D. Material Undisputed Facts or Inconsistencies Preclude the Granting of Summary Judgment in this Matter

The undisputed and disputed material facts favorable to Plaintiff which preclude the granting summary judgment are as follows:

1. Luisi's Blatantly Discriminatory Comments in May 1991 Are Undisputed

It is undisputed that in May 1991 Luisi told Mrs. Godby he did not want her working for him now that she had a baby. Luisi Dep., Ex.2 and 3. Godby reported Luisi's discriminatory comments to his superior, Dick White, Electrolux's Southeast Area Administrator. I Godby Dep. p. 61; White Dep. p. 12. Luisi was never counseled nor reprimanded for making these comments. Luisi Dep. p. 174, R-3-34-J.[1] 2. Godby Was Threatened That Luisi Could Sue Godby's Wife For Recording The Discriminatory Remarks Without His Knowledge Or Consent

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1 A transcript of the relevant comments by Luisi are contained on pages 10 through 12 of Godby's original brief to the Eleventh Circuit.

The day following his complaint to White, Malone called Godby in his office where he was told the recording was made illegally, and that Luisi may sue her if she pursues the matter further.

3. Godby Was Interrogated / Questioned Regarding His Wife's Tape Recording of Luisi's Blatantly Discriminatory Comments By Eight Electrolux Managers

Within days Godby (rather than his wife who actually recorded the conversation) was questioned in depth by eight (8) Electrolux managers regarding his wife's recording of Luisi:

a. Vice President of Human Resources Charles Malone. I Godby Dep. p. 61-62;

b. Electrolux's General Counsel, Steven D. Cooper. I Godby Dep. p. 62-63;

c. John Horigan (Godby's boss); Horigan Dep. pp. 111-112; I Godby Dep. p. 63;

d. Assistant Vice President, Peter Black (I Godby Dep. p. 63);

e. Area Vice President, Joe Galluccio (I Godby Dep. p. 63);

f. Area Vice President, Rich Luisi Godby Dep. p. 63);

g. Merritt Moore (I Godby Dep. p. 63); and

h. North American Compensation Manager, Kevin Hickey (I Godby Dep. p. 63).

Vice President of Human Resources, Charles Malone, stated in his sworn EEOC affidavit that "[t]here is no record that Mr. Godby or Mrs. Godby ever filed a protest with Electrolux" regarding Luisi's misconduct. R-3-34; Malone Dep. Ex. 4, p. 4. Malone, however, then admitted in his deposition that

Godby did report Luisi's pregnancy discrimination comments, as did White. (Malone Dep. p. 52).

Godby submits that the extraordinary scrutiny which he encountered as a result of his wife recording Luisi infers that Electrolux management was very concerned about the Godbys' complaint regarding discriminatory conduct. Godby was threatened with a Luisi lawsuit on several occasions "if the Godbys wanted to pursue the matter," the last being in November 1991, just three months prior to Godby's discharge.

Such scrutiny and threats after a complaint regarding protected activity suggests that Electrolux's claim of an economic reduction in force is pretextual. See, Moss v. Southern Railway, 1986 WL 10510, 41 FEP Cases (BNA) 553, 557-58 (N.D. Ga. 1986)

(imposing unduly harsh discipline which exceeds the misconduct after complaint of discrimination suggests pretext); EEOC v. Carolina Freight Carrier Corp., 1992 WL 131029, 58 FEP Cases (BNA) 1389, 1390 (N.D. Fla. 1982) (allegations that an employee became more disruptive after he complained of discriminatory treatment, where he had not been previously disruptive provides, among other things, grounds to deny an employer's summary judgment motion).

4. Godby's Very Next Performance Evaluation, In November 1991, Reflected An Unprecedented Drop compared to previous Evaluations[2]

2

Electrolux - Jerry Godby's

Although Godby's boss, John Horigan,

Employee Performance Evaluations / Salary History

Date:	Rating	Salary Increase	Supervisor
12/01/80	Excellent	8.1%	Ken Godby
02/01/82	Good	7.5%	Charles McCall
12/22/83	Transfer	Lateral	Joe Fedota
08/01/83	Excellent	9.0%	Kevin Hickey
08/01/84	Excellent	10.0%	Kevin Hickey
01/01/85	PROMOTION	10.0%	Kevin Hickey
08/01/85	Responc.Adj	9.4%	Kevin Hickey
10/1/86	Superior	5.0%	Bill Campbell
02/01/87	PROMOTION	15.0%	Sue Borden
7/01/87	Superior	19.6%	Mary Helen Haban
01/01/88	Superior	4.0%	Mary Helen Haban
03/01/88	PROMOTION	15.0%	Mary Helen Haban
03/01/89	Competent	4.5%	Frank Stinger
03/01/90	Sup/ Comp	3.5%	John Horigan
10/01/90	PROMOTION	15.3%	John Horigan
07/91 - 08/91	Godby protested discrimination of wife		
11/03/91	Comp / Marg	3.0%	John Horigan
02/10/92	Termination (Reduction In Force)		

admitted that Godby was "outstanding" and "superior" and had greatly exceeded his stated objective goals during 1991, Godby received only a "competent/marginal" rating. Horigan Dep. pp. 63-65. Horigan ascribed the rating to poor interpersonal skills (after Godby's twenty-two years with Electrolux). Horigan Dep. p. 65. Even Electrolux's Human Resource Professional, Ms. Debbie Novak, testified that Godby "did a pretty good job in meeting John [Horigan's] goals" and questioned the "marginal" portion of the rating. Novak Dep. pp. 47-48. Godby thought that the unprecedented scrutiny which had followed his complaints about Luisi's discrimination against his wife precipitated this low performance evaluation. I Godby Dep.pp.159-161. In that November 3, 1991 evaluation, no comment was made of any alleged sexual

harassment conduct by Godby or an alleged forged document. These events were known to Electrolux as early as August 1991 -- three (3) months prior to Godby's marginal/competent evaluation of November 3, 1991. See Horigan Dep. p. 86; Novak Dep. p. 23; I Godby Dep. pp. 121-22. Godby also received a three percent (3%) pay raise as a result of the November 1991 evaluation. I Godby Dep., Ex. 21. Electrolux then discharged Godby for alleged reduction in force on February 12, 1992. (See Malone Affidavit of August 31, 1992). Contradictory to this sworn statement by Malone to the EEOC, Electrolux later contends that forgery and harassment were the determining factors for Godby's discharge even though neither were ever mentioned to Godby as performance issues worthy of termination until well into this

litigation. See Electrolux's Motion for Summary Judgment Brief, pp. 20-26.

5. Stated Reasons for Godby's Discharge in February 1992 Are Irreconcilably Inconsistent

When Godby was discharged on February 10, 1992, Godby was told, and corporate documents reflect, that his discharge was "a reduction-in-force" in an "effort to control [Electrolux's] overhead expenses." R-3-34 Ex. C; I Godby Dep. Ex. 40; R-3-34 Ex. B; Malone Dep., Ex. 8.

After his termination, he requested and received a letter of recommendation from Electrolux's Chief Executive Officer, Tom Albani, Electrolux's Chief Financial Officer, Ed Schwartz and Electrolux's North American Compensation Manager, Kevin Hickey. Each gentleman unequivocally recommended Godby as

a competent and devoted employee. I Godby Dep. Ex. 24, 28. In Electrolux's motion for summary judgment at the District Court level pp. 20 through 26, Electrolux changed its position to claim that Godby was actually discharged for three (3) performance-related reasons:

(1) Julian's allegations of sexual harassment that she brought to Electrolux's attention in August 1991;

(2) The alleged forgery of Horigan's signature to an undistributed, unshared memo Godby had written and filed, that Electrolux was also made aware of through Julian in August 1991; and

(3) Godby's defensive reaction to Horigan's unprecedented criticism of which there is no written evidence to support. R-4-46-28.

When Godby's Complaint was brought to Electrolux by the EEOC, Electrolux responded with a sworn affidavit which claimed Godby's termination was based on economic downsizing.

Then, Electrolux claims yet a third reason in their Brief to this Court: Horigan reached the irreversible conclusion he could not work with Godby after receiving Godby's December 10, 1991 memo. See Appellee's Brief, p. 25. Electrolux's attempt to repeatedly change their explanation as to the reason for Godby's discharge, from economic reasons to performance-related reasons to "had enough" with Godby, suggests pretext and is grounds for denying summary judgment in this matter. See Sweat v. Miller Brewing Co., 708 F.2d 655, 32 FEP Cases (BNA) 384, 386 (11th Cir. 1983) (differing accounts given by supervisor for discharge makes summary judgment

inappropriate); Duchon v. Cajon Co., 791 F.2d 43, 40 FEP Cases (BNA) 1432, 1434 (6th Cir. 1986) (summary judgment inappropriate when employer told unemployment compensation agency discharge was for "lack of work" when employer defended discharge on her poor performance); Williams v. Caterpillar, 770 F.2d 47, 30 FEP Cases 985, 987 (6th Cir. 1985) (pretext established when past undisciplined event is later used to justify constructive discharge)..

Although Electrolux may have indeed discharged Godby for performance reasons, the fact they initially articulated an economic reason, as in Duchon, then changed to performance reasons, and then to a "had enough" with Godby reason, creates an inference that Electrolux's stated reason of an "economic-based" discharge was simply

pretext for retaliation in response to Godby's report of discriminatory treatment towards his wife. See, Duchon, *supra*.

The change of position by Electrolux as the reasons for Godby's discharge, is precisely the basis for which the Supreme Court precluded summary judgment in its decision in St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2749 (1993):

> The fact-finder's disbelief of the reasons put forth by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the element of a *prima facie* case, suffice to show intentional discrimination. Thus, rejection of defendant's proffered reasons, will permit the trier-of-fact to infer the ultimate fact of intentional discrimination, [footnote omitted] and the Court of Appeals

was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.' [citation omitted].

In this case, Electrolux's shifting reasons as the basis for Godby's discharge permits a fact-finder to infer that Electrolux was lying regarding the real reason for Godby's discharge. See, Hicks, 113 S.Ct. at 2756 (if employer submits alternative explanations for action, employer risks proffered reason to be disbelieved, issue for jury), Furnco Construction Corp. v. Waters, 438 U.S. 576, 577 (1978) (employer who lies is more likely than not to be trying to cover up illegal discrimination).

6. Electrolux's Stated Reason That Godby's Performance-Related Discharge Was

Based, In Part, On Junie Julian's Allegations of Sexual Harassment Reflects Pretext

Contrary to its economic argument, Electrolux also claims that Godby's discharge was, in part, for alleged sexual harassment of his former secretary Junie Julian. See, Electrolux's Principal Brief at pp. 25 through 30. Although Electrolux uses that as a basis for discharging Godby, it is undisputed that another Electrolux manager, Larry Perryman, who actually made egregious sexually-oriented comments to another female employee, was only disciplined and shortly thereafter was promoted by Electrolux. See R-4-49-11-12.

Dissimilar treatment between a person engaged in protected activity and a person outside that category suggests pretext. See Anderson v. Savage Laboratories, 675 F.2d 1221, 28 FEP Cases (BNA) 1473, 1475 (11th Cir.

1982) (dissimilar treatment of similar employees for similar acts is grounds to deny summary judgment); Wise v. Mead, 614 F.Supp. 1311, 38 FEP Cases (BNA) 1056, 1057-58 (M.D. Ga. 1985) (pretext suggested when employees with similar conduct are treated differently); Evans v. Interstate Brands Corp., 557 F.Supp. 562 aff'd 746 F.2d 813 (11th Cir. 1984) (racial discrimination inferred and summary judgment inappropriate when different people are treated for similar conduct).

Finally, and incredibly, the sexual harassment upon which Godby was in part discharged for was brought to management's attention in August 1991 (I Godby Dep pp. 121-22) and not used as a reason for Godby's discharge until six (6) months later in February 1992. In the meantime, he was not given any type of reprimand. Such slowness in

the issuance of discipline suggests pretext (the conduct was really not serious enough for discharge) and makes summary judgment improper. See Sweat v. Miller Brewing, 708 F.2d 655, 32 FEP Cases (BNA) 384 (11th Cir. 1984) (not disciplining a person for weeks after the conduct occurred, particularly with intervening protected activity, suggests pretext); Daniels v Fowler, 1991 WL 332702, 57 FEP Cases (BNA) 65, 73 (N.D. Ga. 1991) (using as a basis for denial of a promotion conduct which had occurred months previously but for which no discipline was issued suggests pretext).

7. The Alleged "Forged Document", Which Came To Horigan's Attention In July or August 1991, Suggests Pretext

Godby's boss, Horigan, was aware of the "forged" document in July or August when Junie

Julian alleged both sexual harassment and the forgery by Godby. Horigan Dep. pp. 86-87; I Godby Dep. pp. 121-22. Though Electrolux attempted to justify Godby's discharge in February 1992 with this conduct, it was not even mentioned in this marginal/competent November 3, 1991 performance evaluation. Godby Dep., Ex. 40.

Electrolux's decision to wait six (6) months from discovery to justification for discharge suggests pretext. Sweat v. Miller Brewing, *supra*, 32 FEP Cases (BNA) at 386; Daniels v Fowler, *supra*, 57 FEP Cases (BNA) at 73.

8. Electrolux's Elimination of Godby's Job (In Contrast to Others), Coupled With Material Disputes, Suggests Pretext

Finally, Electrolux, out of the blue, decides to eliminate Godby's job, and only

Godby's job, to reduce expenses. Although several thousand dollars were saved, there is no evidence whatsoever presented by Electrolux concerning why Godby's position, in contrast to other positions, was eliminated or whether there was any selection criteria used in determining whether anyone's position, other than Godby's, was considered for elimination. The absence of any selection criteria in a reorganization and reduction-in-force, coupled with other disputed facts, precludes the granting of summary judgment. See, Rose v. National Cash Register Corp., 703 F.2d 225, 31 FEP Cases 706, 708 (6th Cir.) cert. denied 104 S.Ct. 352, 33 FEP Cases (BNA) 48 (1983) (factual issue created when no clearly defined selection criteria was used in reorganization).

CONCLUSION

The undisputed and disputed facts suggest that Godby's work life suffered greatly after he stood up for his wife who was the victim of pregnancy discrimination by an Electrolux manager. That was the beginning of the end for Godby, a twenty-two (22) year employee.

Godby submits that based on the disputed facts in the case, two (2) plausible arguments can be made. By Godby, an argument based on Godby's testimony and the testimony by Electrolux managers, which supports the following inferences:

(1) Godby reported Luisi's conduct to management and that up to eight (8) managers questioned him regarding this recording; Godby threatened with lawsuit for recording Luisi's discriminatory remarks without Luisi's permission in August, September, and November 1991;

(2) Management, including Godby's boss, was upset that Godby had complained about the discriminatory conduct by one manager;

(3) That Godby, a twenty-two (22) year employee began to encounter severe problems with his superior, John Horigan, which culminated in an economic reduction-in-force which was based on no selection criteria; and

(4) Electrolux has presented multiple, ever changing reasons, for Godby's discharge.

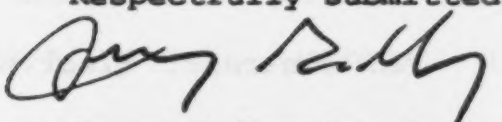
In contrast, Electrolux can paint the picture that Godby, (an employee with an undisputed written record of above-average performance, with promotions and salary increases over a twenty-two (22) year period), was a thorn in management's side, a complainer and had numerous other negative attributes which warranted his discharge. Godby submits, however, that either set of facts is equally

plausible and, as a result, a jury should be given the opportunity to decide which set of facts and whose testimony to believe.

Godby respectfully requests that his Petition For Certiorari be granted and that the Court send this case back to the District Court level for a trial by jury.

This 11 day of January, 1996.

Respectfully submitted,



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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

1. Order of Untied States District Court for the Northern District of Georgia, dated September 26, 1994, granting Elextrolux summary judgment. (92 pages)

2. Judgment of United States District Court for the Northern District of Georgia, dated September 29, 1994. (2 pages)

3. Division of the United States Court of Appeals for the Eleventh Circuit affirming the United States District Court's grant of summary judgment, dated May 30, 1995. (3 pages)

4. Per Curiam denial of Petitioner's Petition For Rehearing and Suggestion of Rehearing En Banc, dated August 9, 1995. (3 pages)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

JERRY GODBY	:	
	:	
vs.	:	CIVIL NO.
	:	1:93-cv-0353-ODE
ELECTROLUX	:	
CORPORATION		

ORDER

This civil rights action is before the court on Defendant's motion for summary judgment and Defendant's motion for oral argument. Plaintiff has filed a response in opposition to the motion for summary judgment. Plaintiff also responded to the

motion for oral argument, but does not oppose it.

Plaintiff contends he was fired on account of his age (40) and in retaliation for his complaints regarding the treatment of his wife, also Defendant's employee, during her pregnancy. Except as noted, the evidence of record shows that the following facts are not in dispute: Plaintiff in 1970 to work in the mail room of its Atlanta, Georgia office. In the years between 1970 and 1989, Defendant repeatedly increased Plaintiff's responsibilities and compensation. Plaintiff received an "excellent" performance rating for the years 1980, 1983, and 1984, and a "superior" rating in February and March 1988. Merit pay increases accompanied these ratings.

By 1989, Plaintiff held the position of purchasing manager. On February 9, 1989, Plaintiff sent a memorandum to Defendant's chief financial officer regarding mistreatment Plaintiff believed he had received from Defendant's human resources director. This memorandum read in part as follows:

> I do not mean to undermine Frank(')s abilities as a director of human resources, but there is a great deal he needs to learn about "corporate priorities before he is given the right to belittle me in the eyes of my department and the executive committee.
>
> I would hope that you would investigate this situation, speak with me in person on this matter

> and give me a true explanation as to how a one year veteran, who was previously a truck driver with no office education or experience, has managed to become my supervisor.

(I Godby Dep., Ex. 1.)[1] Plaintiff indicated on the face of the memorandum that he had sent a copy of the memorandum to, among others, a lawyer named Bill Spence. "Mr. Godby's July 3, 1989 performance review gave him a rating of `marginal' for

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1 Defendant deposed Plaintiff in June and October 1993. The transcripts that resulted from those depositions are respectively cited as "I Godby Dep." and "II Godby Dep."

administrative skills, which included his `ability to work with others toward common goals and objectives'; he received a `C-' for `Interpersonal Skills.' I Godby Dep. Ex. 3. Plaintiff refused to sigh the review. Id." (Defendant's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried ["Defendant's Statement"], ¶ 6.)[2] Plaintiff received a

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Instead of addressing separately each of the paragraphs in Defendant's Statement that he disputes, Plaintiff makes the following blanket objections to those paragraphs (including paragraph six): "Each of these statements reference materials which are either disputed in the record, or have been framed in an incomplete and /or improper

context, thus giving rise to inferences which are not supported by the record." (Plaintiff's Response to Defendant's Statement, ¶ 2.) This objection is insufficient to place in dispute the facts asserted in paragraph six. Local Rule 220-5(b) (2), N.D. Ga., states in part that "[a]ll material facts contained in the moving party's statement which are not specifically controverted by the respondent in his statement shall be deemed to have been admitted." As for the ratings Plaintiff received in the performance evaluation, the evaluation speaks for itself. As for defendant's assertion that Plaintiff refused to sigh the evaluation. Plaintiff's objections are simply

"superior/competent" rating for the 1989-90 rating period.

In August 1990, Plaintiff sent a memorandum to John Horigan, Defendant's vice president for finance. This memorandum read in part as follows:

> I very much regret the necessity to write you concerning this matter, but in fairness to all concerned, it is very obvious that my accomplishments on behalf of Electrolux over the past years have not received due consideration.
>
> I am sure there is no other employee who is more dedicated to the

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unresponsive.

> reduction of unnecessary spending....
>
> ....
>
> Considering my qualifications and duties, I very much feel my salary is not in line with others in the company with comparable duties.

(I Godby Dep., Ex.7.)

In September 1990, Defendant's office services manager left Defendant's employ. Defendant merged the responsibilities of this job with those of Plaintiff's job and gave the position to Plaintiff. The new position was called "manager of purchasing and office services." Horigan became Plaintiff's immediate supervisor. Plaintiff received a $5,000.00 raise following the consolidation of these positions.

Sometime prior to March 1991, Horigan received complaints about a lack of urgency on Plaintiff's part in procuring supplies. In March 1991, Plaintiff sent Horigan a memorandum in response to these complaints. The memorandum read in part as follows:

> I regret that my efforts to obtain value may have on occasion resulted in delay. It has always been by reason of the fact I have endeavored to obtain the best quality merchandise at the lowest possible cost to the company. I f cost were no object, as it once was, these delays could frequently be avoided.
>
> .... a demand for urgency will in most cases result in a greater expenditure to the company.

Id., Ex 11.

During the time at issue, Plaintiff's wife, Patrice, also worked for Defendant.[3] Mrs. Godby worked in Defendant's Sandy Spring, Georgia office. Until June 1991, her superior at the Sandy Springs office was Richard Luisi. Luisi is an area vice president. Mrs. Godby was his secretary.

In April 1991, Mrs. Godby left for an eight-week maternity leave.[4] In May 1991, she taped a telephone conversation she had with Luisi. The subject of this conversation was whether Mrs. Godby would be

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3 Mrs. Godby continues to work for Defendant.

4 Mrs. Godby went into labor while at work.

able to work a flexible schedule despite having had a baby. Defendant apparently does not dispute that Luisi made the following comments during the conversation.

> Well, I want some one that is committed. I want someone, that if I ask them to work overtime for 2-3 hours at night, they can, or if somebody needs to come in for an hour earlier because I have to catch a plane to do something - that is what I mainly need. And that person can not have a baby, can't be in a wheelchair, you know what I mean.
>
> ....
>
> When you have a baby things change.

(Plaintiff's Mem. of Law in Response to Defendant's Motion for Summ. Judg. ["Plaintiff's Response"] at 9 [emphasis in original].)

Luisi moved to Defendant's Atlanta office during Mrs. Godby's maternity leave. Upon Mrs. Godby's return, she was not reassigned to the Atlanta office in order to continue as Luisi's secretary. Instead, she remained at the Sandy Springs office as a divisional sales coordinator. Mrs. Godby's salary did not change. However, Richard White, Defendant's southeast area administrator, answered in the affirmative when asked if the sales coordinator position "would be considered a lower grade job than [the job Mrs. Godby] previously held." (White Dep. at 41)

Plaintiff met with White prior to Mrs. Godby's return from maternity leave. Plaintiff had learned that Mrs. Godby was not to be transferred to the Atlanta office, and told White he felt it was unfair that Mrs. Godby was not being returned to her former position as Luisi's secretary. Plaintiff also told White that Mrs. Godby had taped a telephone conversation with Luisi. White informed his superiors about the taping incident, who in turn passed the information to Charles Malone, Defendant's vice president of human resources. Plaintiff testified that after his conversation with White both Malone and Steven D. Cooper, Defendant's in-house counsel, separately questioned him about the fact that his wife had recorded her conversation with Luisi.

In January 1991, Plaintiff, on behalf of Defendant, hired Junie Julian to work as Plaintiff's secretary. In August 1991, Julian complained to Deborah Novak, Defendant's human resources manager,[5] that Plaintiff had sexually harassed her. A review of each of Julian's charges (which she reiterated via affidavit for purposes of the instant motion) and Plaintiff's response follows:

Julian charged that

5

It is unclear whether Novak was the successor to the "Frank" mentioned in Mr. Godby's February 1989 memorandum, or whether Defendant has both a human resources manager and a human resources director ("Frank's" purported title.).

> Mr. Godby's conduct and language toward me often made me feel uncomfortable. For example, Mr. Godby would take pictures of me from my desk and photocopy them. On one occasion, I took the photographs that he made and shredded them. However, he glued one of the pictures back together. It was not until after Mr. Godby left Electrolux that I found out that he had continued to make photocopies of my pictures and kept them in his desk.

(Julian Aff..¶3.) Plaintiff testified that Julian felt Plaintiff favored another female employee over her because the other employee was more attractive than Julian. (I Godby Dep. at 128.) Julian happened to have at

her desk one of her wedding pictures, a picture that Julian allegedly stated was "the only picture of me I ever though looked pretty." Id. Plaintiff testified that he

> made a copy of it and put it on her bulletin board and I said every time you think that I am showing favoritism to Ina because she's prettier than you are, look at that picture right there and maybe you won't think that, and she took it down and I pinned it back up, and that is the only picture I ever photocopied of her.

Id.[6] Plaintiff admitted that he glued the picture back together after finding it torn in two pieces. Id. at 129.

Julian charged that "Mr. Godby sent me flowers approximately six (6) times. I asked Mr. Godby not to send me flowers." (Julian Aff., ¶4.) Plaintiff testified that he sent Julian flowers, but that he did so only as a morale booster, and that he had sent flowers to other of his employees. (I Godby Dep. at 123-24) When asked if he had sent flowers to Julian on six occasions,

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6 After Defendant fired Plaintiff, additional photocopies of pictures of Julian were found in Plaintiff's desk. Plaintiff disclaimed any knowledge regarding the existence of those photocopies.

Plaintiff testified "I have no idea. Could be six or more. I don't know." Id. at 130 Plaintiff also testified that he stopped sending flowers to Julian after she requested that he stop. Id.

Julian charged that "Mr. Godby asked me it if was possible to have sexual intercourse if you are pregnant. He said that his wife was pregnant and that he had not had sexual intercourse with her for several months." (Julian Aff., ¶5.) Plaintiff testified that he and Julian did have a conversation regarding sexual intercourse during pregnancy, but that Julian initiated the conversation:

> Ms. Julian was my secretary and I went to the doctor's office and she was aware that I went to the doctor's office, she had it on

her calendar. When I got back from the doctor's office, she asked me what the problem was. I told her I had a prostate infection, and she said, you know how to take care of that problem, don't you? And I said no. She said if you have sexual relations quite often it will eliminate the problem, You must not be having very much sex. So I instructed her that my wife was pregnant so it was not possible, and she said, well I did it I was pregnant, and I said my wife is having problems, you can't always do that, and then she said there's more than one way to do it and I ended the conversation right there. That was it for me.

(I Godby Dep. at 131-32.) Plaintiff testified that he ended the conversation because"[i]t was getting a little bit out of hand...[W]hen it gets into all kinds of other aspects of our relationship, it is really not her business and I was trying to be polite to talk with her." Id. at 132

Julian charged that

> [o]n one occasion, Mr. Godby asked me to take a weekend trip with him to Bristol, Tennessee to review inventory levels, and told me several employees from our department were going together. When I learned that he intended to take only me on the trip, and wanted to drive together in a van, I declined his offer.

(Julian Aff., ¶6.) Plaintiff testified that Julian initiated the idea of going to Bristol; he also testified that "she asked me if she could, tell her husband that everybody in the department was going to be going and I said you can tell your husband he can go if he wants to." (I Godby Dep. at 124) Plaintiff stated that the conversation of Julian's status as a non-management employee and the emergence of Julian's sexual harassment allegations halted his efforts to gain approval for the trip. Id. at 125.

Julian charged that

> [o]n occasion, Mr. Godby would stick overnight delivery stickers on my back without me knowing it; he would then begin giggling. Sometimes I would not

> discover these stickers were on my back until I went home and my husband would see them. This was extremely embarrassing to me and adversely affected my marriage.

(Julian Aff., ¶7.) Plaintiff stated that he had no specific recollection of ever placing a sticker on Julian's back. (I Godby Dep. at 132.) However, Plaintiff admitted that on one occasion he had placed stickers on the backs of his employees, and had stickers placed on his back, all as a moral booster in order to relieve the monotony of tedious work in the department. Id. at 133. Plaintiff denied ever placing a sticker on an employee's back without that employee's knowledge. Id. at 134.

Julian charged that

"[o]n one occasion, Mr. Godby brought me some red lipstick and asked me to put it on." (Julian Aff., ¶8.) Plaintiff testified that

> [w]hat happened was, I thought it was fingernail polish. Someone left some lipstick or fingernail polish, I don't know what it was, in the breakroom, red lipstick or red nail polish, I don't remember which, and I took it in there and gave it to Ina and she said she don't like that kind, because Ina liked polka dotted stuff, and so I gave it to Junie. That is all that I remember about that.

(I Godby Dep. at 134.)

Julian charged that "Mr. Godby hardly ever seemed to be working. Frequently he just sat across from me and stared at me." (Julian Aff., ¶9.) Plaintiff denied this allegation. (I Godby Dep. at 134-35.)

Julian charged that Plaintiff "sometimes told me about the `dreams' that he had. He told me that his dreams had not yet come true." (Julian Aff., ¶10.) Plaintiff denied this allegation. (I Godby Dep. at 135.)

Julian charged that "[o]n one occasion, Mr. Godby told me when he saw me in the lobby the day of my job interview, he knew immediately he wanted to give me the job." (Julian Aff., ¶14.) Plaintiff denied this allegation. (I Godby Dep. at 137-38)

Julian charged that "Mr. Godby frequently requested that I go to lunch with

him and vendors, and at one point told me it was part of my job. Frequently, Mr. Godby consumed large amounts of alcohol while at the luncheons." (Julian Aff., ¶16.) Plaintiff testified that he did ask Julian to accompany him when he went to lunch with vendors, but that he never told her it was a job requirement. (I Godby Dep. at 148.) Plaintiff also testified that "I don't recall ever having a drink with Ms. Julian during lunch. I do recall having a drink with a vendor on occasion as lunch. I was told that was proper." Id.

As a result of Julian's complaints, Defendant allowed her to transfer to another department. During his deposition, Plaintiff asserted that Julian made her charges because she wanted to transfer to the other department but had not been in her

position as plaintiff's secretary long enough to warrant a transfer:

> I believe she was told she wasn't in the position long enough to have a transfer. I don't know if that is true or not. I think that is what she said, and somehow she complained to Human Resources that I had sexually harassed her, and I feel she did that to get that other job, but at any rate she got the promotion to the other department.

Id. at 122. Plaintiff further asserted that after Julian's transfer she invited him to lunch because "[s]he just wanted to tell me were there no hard feelings." Id. at 126. Finally, Plaintiff asserted that after Julian's transfer she contacted him in a

effort to gain a job for one of her friends. Id. at 127.

Defendant also learned through Julian of two other episodes of alleged misconduct by Plaintiff. First, Julian revealed that Plaintiff had charged Defendant's corporate account with a Goodyear store for repairs to Julian's car. Second, Julian revealed that in May 1991 Plaintiff had drafted a memorandum which purported to be from Horigan to Plaintiff and had signed Horigan's name to the memorandum.

Plaintiff admitted charging the repairs to Julian's car. Id. at 138. However, he implied that he did not intend to charge the repairs to Defendant's account at Goodyear:

> He was going to send the bill to my attention at Electrolux. I know you are getting at was it on

> the Electrolux charge account. It was charged -- what I told him was to bill it to my attention at Electrolux. That is what I told the Goodyear proprietor, so you can think of it any way.

Id. at 139. On the other hand, Plaintiff later testified that

> [b]efore I took over this responsibility, Jerry Hudson had it, and Jerry Hudson informed me that any time I wanted to get my vehicle repaired, that there was no problem as long as I paid the bill myself when the bill [came] in, and that was through instructions of the CEO that he got his instructions.
>
> ....

> .... I had my car repaired several times or put tires on it. Never had any problem with it. No one ever said anything until this incident with the tape recording came up, no one ever made any mention of anything I did like this to be a problem.

Id. at 145. Moreover, Plaintiff sent two memoranda to Julian in an effort to gain from her the money he ultimately had to pay for the repairs to her car. In one of those memoranda Plaintiff stated that "[t]he repair was put on the Electrolux account by me to give you time to get the money, which you said would help you out of a financial problem. I stepped out of company policy to help you in this matter." Id., Ex. 15 In the other memorandum, Plaintiff stated that

he had made another charge on the Goodyear account for his own car and then made the following request of Julian: "Please pay me the balance you owe me or at least two hundred dollars of it, so that I can pay Goodyear what I owe them, as this is on the Electrolux account as well." Id., Ex.16.[7]

In October 1991, Plaintiff sent Horigan a memorandum after a preliminary meeting regarding his annual performance review.[8] This memorandum read in part as follows:

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7 Plaintiff's explanation for the May 1991 letter is discussed below

8 As is discussed below, Horigan had not learned of the May 1991 letter at the time of the October review.

I am not pleased with the merit review I received from you. No disrespect intended

.....

.... I may be mistaken, but I think you base your opinion of my skills to a great degree on negative feedback you hear from apprehensive complainers rather than on my accomplishments.

....

You ar wrong to judge my interpersonal skills negatively in that I go far out of my way to react to the needs of other is a professional manner.

....

You are also incorrect in you opinion of my administration

skills. No one can perform in this job better than me. To indicated that I fail to undertake or meet deadlines is incorrect.

Id., Ex. 18.

On November 7, 1991, Horigan again met with Plaintiff to discuss his performance review.

Mr. Godby's overall performance rating for 1990-1991 was "C/M" or competent/marginal. I Godby Dep. Ex. 17. Although Mr. Horigan rated Mr. Godby superior to outstanding in certain areas, he was rated marginal in the category of "Implementation and Controlling" and marginal in the area of "Impersonal skills."

However, Mr. Godby was given a 3% raise. I Godby Dep. Ex. 21. (Defendant's Statement, ¶20.) Though they discussed the review, Horigan and Plaintiff did not sign the review form on November 7. Horigan explained this practice as follows: "I just give them an chance to read it, soak it in, if they have a problems with it, if they agree with it." (Horigan Dep. at 86.) Horigan met with Julian regarding her sexual harassment claims at some point during the period in which Plaintiff's performance review was being finalized. During this meeting, Julian revealed the existence of the May 1991 memorandum to which Plaintiff had signed Horigan's name.[9] Horigan testified

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9 Horigan asked Julian to provide him with a

that he was "livid" when he learned of the memorandum. Id. at 95 Horigan related the

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copy of the memorandum, which she did. (Horigan Dep. at 87.) The memorandum reads as follows:

> In a previous conversation and by way of It is apparent [sic] there has been a failure on your part to convey company policy concerning telephone usage to your department. I expect you to resolve this; situation. You will not receive another warning.

Id., Ex 10. The memorandum ends with the name "John Horigan," above which "John" is signed.

subsequent meeting he had with Plaintiff as follows:

A. I asked him if he had ever signed my name to any document and he said no.

Q. Okay

A. And I produced this document, and I said, what's this then?

A. He just brushed it off like it was insignificant.

Q. How did the conversation proceed from there?

A. I said that I was totally in disagreement, that it wasn't insignificant, that he shouldn't have signed my name to it, and I considered that serious misconduct.

Q. Okay. End of conversation?

A. I'm sure there was more to it than that, but that's the essence of the conversation.

Q. Did Mr. Godby offer any explanation?

A. Basically, the end justified the means, that he had trouble controlling his employees and that he thought a letter from me would do the trick.

Id. at 96

It appears that Horigan and Plaintiff had the foregoing discussion on November 25, 1991. It further appears that Horigan sent the following memorandum to Malone immediately following his November 25 meeting with Plaintiff:

I met with Jerry on November 7th and conducted his personnel review. Subsequent to my initial written review (approximately October 10) and prior to the November 7th meeting, it came to my attention that Jerry had signed my signature to a letter he had written without my prior knowledge or authority. (see letter enclosed). Jerry admitted signing my signature and regardless of Jerry's intensions or the results of the letter, I consider this a serious misconduct and a complete lack of maturity /responsibility on his part. I spoke to him pointedly and candidly so there was

nomisunderstanding by Jerry of the seriousness of forging my signature.

Accordingly , I recommend delaying his pay increase (3%) to January 1, 1992. Lastly, any misconduct of a similar serious nature could include further disciplinary action up to and including dismissal.

Id., Ex. 11.[10]

10

Horigan's discription in the November 25 memorandum regarding when he learned of the May 1991 memorandum is at variance with his deposition testimony. That is, the November 25 memorandum describes the discovery as

occuring before November 7, while Horigan testified that he discovered the existence of the memornadum after November 7:

Q. Did you discuss the forgery, what you call the forgery, with Mr. Godby during his review.

A. No.

Q. When did that come to light?

A. Subsequent to the review.

Q. Do you know when it came to light?

A. In the fall sometime.

. . . .

Q. Okay. But the performance evaluation was discussed with Mr.

On December 10, 1991, Plaintiff sent Horigan a densely-worded memorandum in which he offered his justifications for drafting the May 1991 memorandum and singing Horigan's name to it. Plaintiff essentially contended (at length) that only the best of

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Godby on November 7th?

A. Yes.

Id. at 81. Horigan's confusion may stem from the fact that he apparently conducted two preliminary performance reviews with Mr. Godby (i.e., one on October 10 and one on November 7). In any event, Horigan's confusion does not appear to be material.

intentions motivated his actions.[11] Plaintiff

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11 Plaintiff's goal in this memorandum was to demonstrate that his good intentions more than made up for his error in signing Horigan's name. However, at one point Plaintiff (apparently unconsiciously) undercut the point he was trying to make:

> I feel the real seriousness of the matter is that this information was taken out of my desk and out of a personal file within this desk without my knowledge or consent. I feel that this is a direct invasion of my privacy and that regardless of the intent of the perpetrator this action does

further asserted that at one point he had attempted, without success, to gain Horigan's signature on the May 1991 memorandum. He closed the memorandum with the following paragraph:

> I am disappointed that you have such a supine opinion of my character. I can do no better than my best and that is what I have given to Electrolux and to you since I took this position. I do not deserve this kind of reprisal when you know quite well
>
> ---
>
> show willful contempt and disrespect respect toward me and to my possition as a manager.

(Horigan Dep., Ex. 8 [emphasis added].)

that I would not intentionally do anything against you or the organization.

Id.

In December and Janauary 1992, a memorandum circulated among some of Defendant's executives regarding a "Star Performers Desk Mat" project that had been underway since July 1991, but that had not yet been completed. On January 10, 1992, an executive named Peter Black, responding to a query from Gary Griffin (Defendant's North American vice president for sales), placed the following handwritten notation on the memorandum: "Gary [-] It's in the works with Jerry Godby. I have no idea when it will materialize, but if it had been my project it would be completed by now! Pete." (I Godby Dep., Ex.19.) On January

18, 1992, Plaintiff, apparently having been questioned about the tardy project and having seen Black's comments, sent a lengthy memorandum to Griffin. It is fair to say that Plaintiff disclaimed all responsibility for the tardiness of the project and laid all blame at the feet of the marketing department. See id.

Plaintiff's January 18 memorandum contained the following statement:

> Although I feel that Purchasing reacted properly and promptly, I am always open to any suggestions [Black] might provide me that would result in a quicker turn around on a project such as this so long as his solution is not reflective of enormous rush charges which will inflate the

> Home Office cost which will drive up the branch cost to a figure that the manager will not want to pay.

Id. (emphasis and bold in original). This statement shows Plaintiff's didication to cost cutting.[12] Horigan testified that this dedication interfered with Plaintiff's ability to perform the other requirements of his job, "parimarily to do the job timely." (Horigan Dep. at 14.) Horigan testified that a specific example of this problem concerned sales contracts:

> A. Probably the best example is, we purchased sales contracts for

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12 Cf. Plaintiff's March 1991 Memorandum, supra at 3.

the field. He would get so involved with cost cutting on the sales contracts that the field would run out of contracts. So we would get calls from branches and divisions, the sales reps have no contracts. It's hard to sell a vacuum cleaner without a contract. And this didn't happen once or twice, it happened three or four times.

Q. Is that something you ever counseled Mr. Godby about?

A. Continually.

Q. Was that ever done in writing?

A. At his annual review it was done in writing, but throughout the year it was verbal consultation.

Id. at 14-15[13]

In summarizing Plaintiff's alleged overemphasis on the cost cutting function of his position, Horigan testified that "[i]t was consistently the same thing,... where a normal check and balance became an obstructionist kind of thing. Things were being crisis managed." Id. at 15.[14]

13

The performance evaluation which Horigan and Plaintiff signed in November 1991 contains the comment that Plaintiff "needs to complement his skills of completing monetary objectives with being sensitive to other personnel and their needs

14

On January 18, 1992, Plaintiff also drafted

On February 10, 1992, not quite three months after Plaintiff's fortieth birthday. Horigan and Malone met with Plaintiff and told him that he was being discharged because his position had been eliminated.

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a memorandum to Tom Albani, Defendant's chief executive officer, though he never sent the memorandum to Albani. That memorandum contained the following statement: "It seems to me that people who complain about me are the ones that I have noticed to be the thriftless spenders in the organization. They seem to forget so often that this company is still under extreme financial stress." They seem to forget so often that this company is still under extreme financial stress." (I Godby Dep. , Ex. 20 [emphasis in original].)

In this regard, a February 6, 1992 memorandum from Horigan to Malone included the following statements:

> In a continuing effort to control our overhead expenses and to structure my department in the most effective way possible, I have decided to combine two managerial positions. Manager of Office Services with Manager of North American Payroll.
>
> Specifically, Kevin Hickey, Manager of North American Payroll will assume responsibilities for both positions and Jerry Godby's position - Manager of Office Services, will be eliminated.

Id., Ex. 12.[15]

15

Defendant submitted Malone's affidavit in response to the EEOC complaint that Plaintiff filed. In his affidavit, Malone stated that

> Mr. Godby's management responsibilities were consolidated and delegated to an individual who originally supervised the Purchasing and Office Services fundtions, the Manager of Payroll. The Purchasing and Office Services functions were split with purchasing responsibilities remaining with the incumbent Purchasing Assistant. Office

Horigan testified about the February 6 memorandum and the circumstances surrounding Plaintiff's termination as follows:

> Q. What brought about Mr. Godby's termination?
>
> A. For all the previous incidents of poor performance that we've spoken about earlier.

> Services responsibilities were assigned to a new Supervisor of Office Services. As a result of these changes, we experienced a reduction in annual payroll cost of $15,000.00.

(Malone Dep., ex. 4.) Plaintiff disputes the amount of savings that allegedly resulted from his dismissal.

Q. Okay. And yet the memo makes no mention of those performance issues?

A. No, it does not.

Q. Is ther any reason for that?

A. The termination was under a cost reduction basis. The purpose of that was to allow Mr. Godby to collect severance pay.[16]

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16 Plaintiff in fact received severance pay totalling $25,330.00. In March 1992, Defendant also paid Plaintiff a bonus. Albani signed the letter that accompanied the bonus check; the letter read as follows:

> Enclosed please find a check representing your 1991 bonus payment.

Q. Had that been discussed previously with Mr. Malone?

A. Yes, it had.

Q. When did those discussions begin?

A. I'd say subsequent to the December 10th memo from Godby to myself.

Q. So you received a memo, I guess, giving his viewpoint on his performance evaluation?

A. Right.

Q. And then decided to fire him?

As you probably know, Electrolux met its Excess Cash Flow goals for 1991. Good luck in your current endeavors and thanks for your past service and contribution to the success of Electrolux.

A. Basically.

Q. Okay. What was it in that memo that made you decide to fire him?

A. General tone. That I couldn't in my opinion, get through to him the seriousness of the situation in terms of his performance, couldn't get through to him -- three major incidents that I thought were each one in themselves substantial. And he just seemed to brush all of that off and go on his merry way. So I reached a conclusion at that point that it was best that we terminate him.

. . . .

A. It was my opinion that this [signing Horigan's name to the May 1991 memorandum] was the straw that broke the camel's back. I felt that

I'd stuck with him a long time and in a matter, despite continuous counseling as to his performance and these specific incidents throughout the summer, it didn't appear that we were going to change.

Id. at 118-19, 121.

When Horigan and Malone met with Plaintiff to tell him that he was being terminated, Plaintiff requested that he be given a position as a supervisor. This request was denied. Within a month after his termination, Plaintiff met with Ed Schwartz, Defendant's chief financial officer, and asked for a position as a vacuum cleaner salesperson. Schwartz granted Plaintiff's request. On or about March 15, 1992, Plaintiff applied for the new supervisor of office services postion

mentioned earlier.[17] Defendant declined to hire Plaintiff for this position.

In connection with the salesperson position, Defendnat offered Plaintiff a contract that contained an alleged guarantee of $550.00 per week. Plaintiff refused to sign this contract because he did not believe it was legally binding. Defendant refused to sign the contract that Plaintiff offered as an alternative. Plaintiff admitted that he "not a very good salesperson,""was not producing a lot of sales," (I Godby Dep. at 195.) In August 1992, Defendant fired Plaintiff from his salesperson position. Plaintiff does not contest the legality of that action.

17

. Footnote 15, supra.

Plaintiff filed a complaint with the EEOC on July 28, 1992. The complaint read as follows.

> I was employed by Electrolux for twenty-one (21) years until I was discharged on February 10, 1992.
>
> I believe I was discharged because of my protest to Electrolux that my wife, Patrice, also an Electrolux employee, was discriminated against and demoted because of her sex and because she had a child in April 1991.[18] After

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[18] Mrs. Godby apparently never complained to the EEOC regarding the alleged discrimination she encountered.

my protest, I received the worst evaluation in my twenty-one (21) years and was discharged in February 1992 allegedly for reduction in force. I was replaced by a younger employee. Both actions were done because of my age and in retaliation for my protest against the discrimination encountered by my wife.

I request reinstatement, back pay, gront pay, attorney's fees, costs, Three Hundred Thousand Dollars ($300,000.00) in damages, and any other relief allowed for under the Civil Rights Act of 1991.

_____

Id., Ex. 27.[19]

Defendant's response to Plaintiff's complaint included the affidavit by Malone Mentioned earlier. In that affidavit, Malone detailed Defendant's assertion that it eliminated Plaintiff's position in a

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19

On August 28, 1992, Plaintiff apparently amended his complaint, though neither party has provided the court a copy of that amendment. See II Godby Dep., Ex. 44. On November 8, 1992, Plaintiff amended his complaint to include an allegation that Defendant's refusal on March 15, 1992 to hire him for the position of office services supervisor was motivated by his age and in retaliation for his complaints regarding his wife's treatment. Id.

cost-cutting move. Malone also discussed some of the alleged misconduct by Plaintiff in the year prior to his discharge (i.e., signing Horigan's name to the May 1991 memorandum and Julian's allegations of sexual harassment). Neither party has provide the court a copy of the EEOC's determination regarding Plaintiff's charges.

Plaintiff filed this action of February 16, 1993. He asserts claims under the Age Discrimination in Employment Act, 29 U.S.C.§§621-634 ("ADEA"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e to 2000e-17 ("Title VII"). In his complaint, Plaintiff asserts the same claims he made before the EEOC.

Summary judgement is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P 56 (c). In ruling on Defendant's motion, the court must view the evidence in a light most favorablr to Plaintiff. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). To prevail on its motion for summary judgment, Defendant must show that the evidence is insufficient to establish an essential element of Plaintiff's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If defendant makes a sufficient showing, then Plaintiff "must come forward with `specific facts showing that there is a genuine issue for trial.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587

(1986) (quoting Fed.R.Civ.P. 56 (e)). If the evidence supporting Plaintiff's claims is insufficient for a jury to return a verdict for him, or is merely colorable or not significantly probative, then Defendant is entitled to summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If, however, reasonable minds could differ as to the import of the evidence, and a reasonable interpretation of the evidence could lead to a verdict for Plaintiff, then summary judgment is inappropriate. Id. at 251-52.

ADEA CLAIM

"A plaintiff may establish a prima facie case of age discrimination in three ways: by presenting direct evidence of discriminatory intent; by meeting the test set forth in McDonnel Douglas Corp. v.

Green, 411 U.S. 792 . . . (1973); or by demonstraing through statistics a pattern of discrimination." Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir.1990). Neither party has offered statistical evidence, so the court need consider only whether direct or circumstantial evidence of discrimination exists here.

Defendant asserts that there is no direct evidence of age-based discrimination in this case. Plaintiff disagrees by citing two examples of alleged discriminatory comments. First, Plaintiff testified that

> on our 20-year anniversary presentation in front of the entire group Charles Malone stated when I came up to receive my award that here's another fellow that does not look his age, and

> presented me -- I am assuming he was saying I did not look 40 years old. He said it in front of the entire company.

(I Godby Dep. at 204.) Second, Plaintiff testified that Novak "did not think I was old enough to have . . . a 20-year-old son and wanted to see my driver's license." Id.

These examples fail to qualify as direct evidence of age-based discrimination. "[Only the most blatatnt remarks, whose intent could be nothing other than to discriminate on the basis of age, . . . constitute direct evidence of discrimination." Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989) (footnote omitted). The remarks Plaintiff cites appear to have been nothing more that innocent banter; they certainly cannot

qualify as remarks whose sole intent was discrimination.

In the seminal cases of McDonnell Douglas Corp. and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1973), the Supreme Court established a three-step process for the "allocation of burdens and order of presentation of proof" when a plaintiff relies on circumstantial evidence to show discriminatory treatment. Grigsby v. Reynolds Metals Co., 821 F. 2d 590, 594 (11th Cir. 1987). Ingeneral, the plaintiff must first show a prima facie case of discrimination. The defendant then has the burden of showing "legitimate, non-discriminatory reason for the defendant's actions. See McDonnel Douglas, 411 U.S. at 802-804; Burdine, 450 U.S. at 253-255.

In the ADEA contest, a plaintiff makes out a prima facie case by showing "(1) that he is a member of the protected group; (2) that adverse employment action was taken against him, e.g. discharge, demotion, or gailure to hire; (3) that he was replaced by a person outside the protected group; and (4) that he was qualified for the position for which he was rejected." Carter, 870 F.2d at 582 (footnote omitted). Defendant argues that Plaintiff cannot show any evidence regarding the existence of the first element.

The ADEA protects "individuals who are at least 40 years of age but less that 70 years of age." 29 U.S.C. §631 (a). Defendant does not dispute that Plaintiff was forth years old at the time of his termination. Instead, Defendant makes the

novel argument that there is no evidence any of Plaintiff's co-workers knew he was approaching or had reached forth years of age.[20] Given the alleged comments noted above by Malone and Novak, the court finds that there is a genuine dispute over whether Defendant knew Plaintiff's age. Moreover, given the command that Plaintiff merely be

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Defendant has produced evidence that on several occasions Plaintiff, when filling out company forms, wrote 1956 as his year of birth, not 1951. Moreover, it is undisputed that Plaintiff possessed a Georgia driver's license which showed his year of birth to be 1956. Plaintiff testified that he informed Novak of this discrepancy when he show her his license. (I Godby Dep. at 204.)

"a menber of the protected group, " Carter, supra, the court does not believe Defendant's argument has a legal basis.[21]

Defendant next argues that it had legitimate, non discriminatory reasons for firing Plaintiff. In support of this argument, Defendant points to Plaintiff's signing of Horigan's noame to the May 1991 memorandum, julian's sexual harassment claims, and Plaintiff's repeated defensive reactions when he received criticism. Based on the facts discussed earlier, the court finds without further analysis that

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An argument that Defendant lacked knowledge regarding the fact that Plaintiff had reached forth years of age would be appropriate vis-a-vis the pretext issue.

Defendant had adequate reasons for firing Plaintiff. Thus, it is Plaintiff's task to show that these offered reasons are pretextual.

"[T]he issue of pretext does not address the correctness or desirability of reasons offereed for employment decisions. Tather, it addresses the issue of whether the employer honestly believes in the reasons it offers." McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 373 (7th Cir. 1992). Moreober, since the court has found that Defendant had legitimate, non-discriminatory reasons for firing Plaintiff, he "must. . . present concrete evidence in the form of specific facts which show that . . . [D]efendant's prooffered reason[s] [are] mere pretext. Mere conclusory allegations and assertions

will not suffice." Earley, 907 F.2d at 1081.

Plaintiff initially attacks Defendant's allegations that it viewed Plaintiff's conduct in connection with the May 1991 memorandum as a very serious matter. First, Plaintiff asserts that, "even after all the facts surrounding this incident came to light, Mr. Horigan failed to take any disciplinary action even approaching the gravity of Mr. Godby's eventual discharge." (Plaintiff's Response at 39.) Second, Plaintiff asserts that Horigan's one-month delay in discussing the incident with Plaintiff shows that Defendant has inflated the significance of the incident. Finally, Plaintiff offers the following argument:

> Electrolux further disputes Mr. Godby's decision to write a

memorandum explaining his version of the facts surrounding the accusations of forgery. Apparently, Electrolux suggests that, rather than react to the unprecedented attacks on his character (which came on the heels of turning (40) and his objections to the acts of discrimination against his wife), Mr. Godby should have made no effort to respond to what he perceived to be unfair and discriminatory conduct. Given his suprise at the unprecedented criticism, it is suprising that Mr. Godby's objections were not more vehement.

Id.at 40-41.

Plaintiff's argument is unpersuasive. Given Horigan's status as a senior executive for a large corporation, the court finds nothing suspicious about either the relative nothing suspicious about either the time lag between Horigan's discovery of the May 1991 memorandum and his confrontation of Plaintiff with that knowledge, or Horigan's spparent tactical decision to address the issue outside the confines of Plaintiff's annual performance review. The court also finds nothing unusual about the discipline Horigan initially meted out over the signature incident, for the testimony by Horigan set out earlier strongly suggests that the memorandum Plaintiff wrote on December 10, 1991 was more important than the signature incident itself in Defendant's decision to fire Plaintiff. Plaintiff's

argument regarding his motivation for writing the memorandum does nothing to satisfy the evidentiary burden he must satisfy.

Plaintiff next asserts that Defendant's reliance on Julian's sexual harassment charges is "[u]nworthy or [c]redence." (Plaintiff's Response at 41.) First, noting that no contemporaneous written records of Julian's charges exist, Plaintiff asserts that Malone deviated from his routine practice of carefully documenting sexual harassment allegations.[22] Second, Plaintiff

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Plaintiff cites page 30 of Malone's deposition for this assertion. The cited page contains no mention of Malone's alleged practice with regard to sexual harassment

disputes that Malone or Horigan ever disciplined him via a verbal counceling session for his alleged behavior toward Julian. Third, Plaintiff notes that Julian's charges were not mentioned in Plaintiff's 1991 performance review. Finally, Plaintiff asserts that Defendant failed to investigate a previous allegation of sexual harassment which had been made against Plaintiff before his fortieth birthday. Based on the following discussion, the court finds that these arguments fail to show any concrete evidence that Defendant did not honestly rely on the sexual harassment charges in deciding to terminate Plaintiff.

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charges.

The court finds nothing unusual about Malone's failure to make any notes regarding his handling of Julian's charges. Julian's charges were oral, not written. (Malone Dep. at 130.) Malone had never before investigated a charge of sexual harassment that originated at Defendant's headquarters in Atlanta. Id. at 142. Julian "was not particularly interested in seeing [Plaintiff] punished or injured in any way. She just wanted this situation to cease." Id. at 132. Malone testified that "we reached a mutual agreement with both parties" under which Julian received a transfer and Malone counseled Plaintiff regarding the inappropriateness of his behavior. Id. at 132-33.

Plaintiff expressly testified that he attended a meeting with Malone and Horigan

at which they discussed Julian's charges. (I Godby Dep. at 123.) However, Plaintiff specifically denied receiving any negative counseling as a result of Julian's allegations. Id. at 125.[23] The court views

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Novak testified that, after hearing Julian's charges, "I talked to Chuck Malone about it." (Novak Dep. at 27.) Malone testified that he questioned Plaintiff regarding Julian's charges. (Malone Dep. at 130.) Malone also testified that Plaintiff "was advised and counseled that the kinds of things that led to [Julian's allegations . . . indicated that he had exercised poor judgment in not being able to recognize that these issues were an issue of hers, and he

Plaintiff's denial as nothig more than an example of the "mere conclusory allegations and assertions" that under Earley are ineffective as evidence of pretext. Id., 907 f.29 at 1081.

Defendant's failure to mention Julian's charges in Plaintiff's 1991 performance evaluation is consistent with the resolution of Julian's charges described above. It is also consistent with Horigan's testimony that "I felt that I'd stuck with him a long time and in a matter, despite continuous counseling as to his performance and these specific incidents throughout the summer, it didn't appear that we were going to change." (Horigan Dep. at 121.)

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was advised that that was inappropriate conduct." Id. at 133.

In January 1991, Plaintiff and Novak together fired on Karen Klotzsche, who had been Plaintiff's secretary.[24] In her memorandum to the file regarding Klotzshe's termination, Novak recorded that

> [a]s [Klotzsche] was leaving the room, she told us that we would hear from her attorney. At this point, I left the Office Services area. Karen then told Jerry that Electrolux would hear from her attorney, and Jerry would also hear from her attorney for sexual harrassment.

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24 Klotzsche presumably was Julian's immediate predecessor

> This is the first and only occasion that Karen has ever mentioned sexual harassment. She has never reported any type of sexual harassment to Human Resources.

(I Godby Dep., Ex. 9.) The court does not find it unusual that Defendant did not investigate Klotzsche's claims. A terminated employee may make claims that have no substance. Moreover, Klotzsche, unlike Julian, made no specific allegations against Plaintiff. Finally, since Klotzsche had left Defendant's employment, the only logical route for her to seek redress for the harassment she allegedly endured was through the EEOC; however, it appears that no formal charges ever followed Klotzsche's conclusory allegation.

In his final argument on the pretext issue, Plaintiff asserts that "Electrolux now points to isoloated portions of a memorandum offered three (3) months prior to his discharge [i.e., the December 10, 1991 memorandum] as being indicative of his overall performance." (plaintiff's Response at 43 [emphasis in original].) This assertion is puzzling. In arguing that Plaintiff's defensive reaction to criticixm in part motivated his dismissal, Defendant cites a number of memoranda that Plaintiff wrote during his employment; the December 10 memorandum is not one of them. The undisputed facts discussed earlier show that Plaintiff did, in fact, repeatedly react in a defensive fashion when he received

criticism; no reasonable jury could find otherwise.[25]

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Plaintiff repeatedly implies that Defendant's criticism of his performance started only in the year before his fortieth birthday. However, the undisputed facts show that Plaintiff disagreed with and refused to sigh his July 1989 performance evaluation, more than two years before his fortieth birthday. Even if Plaintiff were correct, merely demonstrating the conincidence between Plaintiff's fortieth birthday and the criticism he received is not the "concrete evidence" that Earley requires.

> The burden to avoid summary judgment is not ot show by a preponderance of evidence that the reasons stated were pretext. Rather, plaintiff's burden at summary judgment is met by introducing evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the non-moving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext. . . .

Hairston v. Gainesville Sun Publishing Co., 9 F. 3d 913, 921 (11th Cir. 1993). Based on the foregoing discussion, the court finds that Plaintiff has failed to produce

evidence which satisfies the standard that Hairston describes. Therefore, the court grants Defendant's motion for summary judgment on Plaintiff's ADEA claim.

TITLE VII CLAIM

It is unlawful for an employer to discriminate against an employee because that employee "has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. §2000e-3(a). To make out a prima facie case of retaliation, Plaintiff must show (1) that he engaged in statutorily-protected conduct, (2) that adverse employment action occurred, and (3) that a causal link exists between the protected conduct and the adverse employment action. Tipton v. Canadian Imperial Bank of

Commerce. 872 F.2d 1491, 1494 (11th Cir. 1989).

Plaintiff asserts that the adverse consequences he suffered were a result of his complaints regarding the alleged mistreatment Mrs. Godby received as a result of her pregnancy.[26] "A plaintiff need not

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Section 2000e-2(a) makes it an unlawful employment practice for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's . . . sex." Section 2000e (k) states in part that

> [t]he terms "because of sex" or "on the basis or sex" include, butare

establish that the conduct she opposed was in fact discriminatory, but, rather, must demonstrate a good faith reasonable belief that the underlying challenged action violated the law." Cobb v. Anheuser Busch, Inc., 783 F. Supp. 1457, 1490 (E.D. Mo. 1990). Given Luisi's undisputed comments, there is certainly a genuine dispute over whether Plaintiff had a good faith

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not limited to, because of or on the basis or pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

reasonable belief that Mrs. Godby had been subjected to discrimination as a result of her pregnancy. Thus, Plaintiff has produced credible evidence in support of the first two prongs of the prima facie case test.

The third prong (the causal link) of the prima facie case test is satisfied for summary judgment purposes by producing evidence that the protected activity and the subsequent adverse action were not wholly unrelated. Hairston, 9 F. 3d at 920. This evidentiary burden can be satisfied by showing that only a short period of time elapsed between the protected activity and the adverse action. See Donnellon v. Fruehauf Corp., 794 F.2d 598, 601 (11th Cir. 1986) (discharge occurred one month after

filing of EEOC Complaint).[27] In this case

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"`[A] plaintiff must generally establish that the employer was actually aware of the protected expression at the time it took the adverse employment action.'" Hairston, 9 F.3d at 920 (quoting Godsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). Defendant argues that the causal link cannot exist because Horigan did not know of Plaintiff's complaints at the time Defendant fired him. However, Horigan testified that Malone told him of the tape recording of Luisi's comments in the summer of 1991, and that Malone had in "general terms" told him about the contents of the tape. (Horigan Dep. at 111.) Since Malone

Defendant fired Plaintiff between seven and eight months after Plaintiff complained to White about Mr. Godby's treatment. Defendant asserts that this is too large a temporal gap to establish the causal link.

In Hairston, the court held that the plaintiff had shown a causal link where his discharge came not quite five months after he had filed and ADEA action. Id., 9 f.3d at 920 (ADEA action filed on January 29, 1991; discharge occurred on June 24, 1991). Nevertheless, taking into account all of the facts of this case, the court is of the opinion that the seven to eight month gap

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and Horigan were instrumental in Plaintiff's dismissal, this testimony alone raises a genuine dispute on the actual awarness issue.

between Plaintiff's complaints and his discharge is too long too establish a causal link. Cf. Dickerson v. Metropolitan Dade County, 659 F. 2d 574, 581 (5th Cir. Unit B Oct. 1981) (no causal connection were discharge came four and one-half years after complaint and eight months after amendment of complaint).[28]

Based on the foregoing discussion, the court finds that Defendant has succeeded in showing the absence of a genuine dispute

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In Stein v. Reynolds Sec., Inc., 667 F. 2d 33, 34 (11th Cir. 1982), the Eleventh Circuit adopted as binding precedent decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

over the existence of the causal link.[29] As a consequence, there is insufficient evidence to show a genuine dispute over the existence of a prima facie case of retaliation. Even if there were such a dispute, Defendant would still prevail;

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Plaintiff argues that his prior "outstanding performance" is evidence that supports the causal connection prong. However, an employee's "own self-interested assertions concerning her abilities are not in themselves sufficient to raise a genuine issue of material fact." Williams v. WIlliams Elecs., Inc., 856 F.2d 920, 924 (7th Cir. 1988). The court thus rejects this argument without further analysis.

Plaintiff offers no additional argument in the Title VII portion of its brief to demonstrate a genuine dispute over whether Defendant's reasons for firing Plaintiff are pretextual. Therefore, the court grants Defendant's motion for summary judgment on Plaintiff's Title VII claim.

Accordingly, Defendant's motion for summary judgment [#31-1] is GRANTED. Defendant's motion for oral argument [#39-1] is DENIED. The Clerk id DIRECTED to enter judgment for Defendant on all counts.

SO ORDERED, this 26 day of September 1994.

S/ Orinda D. Evans

ORINDA D. EVANS

UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

SEPTEMBER 2, 1994

L.D.T., CLERK

BY

DEPUTY CLERK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

JERRY GODBY	:	
	:	
vs.	:	CIVIL NO.
	:	1:93-cv-0353-ODE
ELECTROLUX	:	
CORPORATION		

Judgment

This action having come before the court, Orinda D. Evans, United States District Judge, for consideration of the motion for summary judgment, and the court having granted same, it is

Ordered and Adjudged that the plaintiff, Jerry Godby, take nothing, that

the action be dismissed, and that the defendant, Electrolux Corporation, recover from the plaintiff the costs of this action.

Dated at Atlanta, Georgia, this 26th day of September, 1994.

Luther D. Thomas, Clerk

By:s/ Diane Taylor

Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 29, 1994
Luther D. Thomas, Clerk
By:s/ Diane Taylor

Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-9180

Non-Argument Calendar

D.C. Docket No. 1:93-cv-353-ODE

JERRY GODBY,

Plaintiff-Appellant,

versus

ELECTROLUX CORPORATION,

Defendant-Appellee.

Appeal from the United States

District Court

for the Northern District of Georgia

(May 30, 1995)

Before ANDERSON and CARNES, Circuit Judges,

and JOHNSON, Senior Circuit Judge.

PER CURIAM:

Jerry Godby appeals the district court's grant of summary judgment in favor of Godby's former employer, Electrolux Corporation, in Godby's suit claiming violations of the Age Discrimination in Employment Act, 29 U.S.C.A. § 621, et seq. (West 1985 & Supp. 1994), and Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e), et seq. (West 1994). Upon careful review of the record, we conclude that summary judgment was properly granted in this case.

AFFIRMED.

FILED

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

MAY 30 1995

MIGUEL CORTEZ

CLERK

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No 94-9180

JERRY GODBY Plaintiff-Appellant,

versus

ELECTROLUX CORP.

Defendant-Appellee.

On Appeal From the United States District Court for the Norther District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OR REHEARING EN BANC

Before: ANDERSON and CARNES, Circuit Judges, and Johnson, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are Denied and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/_____

UNITED STATES CIRCUIT JUDGE

ORD-42

(9/91)

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

AUG-9 1995

MIGUEL J. CORTEZ

CLERK

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

No. 95-1123

In The

Supreme Court of the United States

October Term, 1995

JERRY GODBY,

Petitioner,

vs.

ELECTROLUX CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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32 pp

QUESTIONS PRESENTED

I. Did the Court of Appeals properly affirm the District Court's grant of summary judgment in favor of Electrolux on Godby's age discrimination claim?

II. Did the Court of Appeals properly affirm the District Court's grant of summary judgment in favor of Electrolux on Godby's retaliation claim?

LIST OF PARTIES

All parties having an interest in this lawsuit are listed on the title page of this document.

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1. Luisi's comments are undisputed. 16

2. Godby was told his wife could be sued for secretly tape recording her supervisor. 16

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Respondent, Electrolux Corporation ("Electrolux"), respectfully submits that Petitioner Jerry Godby's ("Godby") Petition for Writ of Certiorari ("Petition") should be dismissed. Godby seeks review of the Eleventh Circuit's decision affirming the United States District Court for the Northern District of Georgia's grant of summary judgment in favor of Electrolux. As discussed below, the Eleventh Circuit's decision presents no conflict with the decisions of any other United States Court of Appeals or with the decisions of this Court. Moreover, the Eleventh Circuit's decision was the result of a careful and thorough analysis of the undisputed facts presented to the District Court. Accordingly, the Petition raises no issue worthy of this Court's review.

OPINIONS BELOW

The District Court opinion granting summary judgment to Electrolux is reported at *Godby v. Electrolux Corp.*, 1994 U.S. DIST. LEXIS 19831, 66 Fair Empl. Prac. Cas. (BNA) 1704 (N.D.Ga. 1994), and is reprinted in the Petition. The Eleventh Circuit affirmed the District Court's ruling without opinion on May 30, 1995. That decision is reported at *Godby v. Electrolux Corp.*, 58 F.3d 641 (11th Cir. 1995) (per curium), and is reprinted in the Petition. Godby's Suggestion for Rehearing En Banc was denied by the Eleventh Circuit on August 9, 1995. That decision is reported at *Godby v. Electrolux Corp.*, 65 F.3d 185 (11th Cir. 1995), and is reprinted in the Petition.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the Eleventh Circuit was invoked pursuant to 28 U.S.C. § 1291, as an appeal of right from the District Court's final order granting summary judgment in favor of Electrolux. The District Court had federal question jurisdiction under 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

Rule 56 of the Federal Rules of Civil Procedure

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*

The Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*

28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

A. Proceedings And Dispositions Below

This is an employment discrimination case in which Godby alleges that Electrolux discharged him in February, 1992, and refused to rehire him in March, 1992, because of his age (40) in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* R1-1.[1] Alternatively, Godby asserts that Electrolux discharged him, and subsequently refused to rehire him, in retaliation for "protesting" alleged sex discrimination against his wife, Patrice Godby, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*[2]

Following extensive discovery, Electrolux filed a motion for summary judgment as to both claims. R2-31. On September

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1. Citations to the Record will be in this form: R (volume number) — (document number) — (page number, if applicable).

2. As discussed below, it is not clear whether Godby has now abandoned the age discrimination claim as his Petition focuses primarily on his retaliation claim.

26, 1994, District Court Judge Orinda Evans granted Electrolux' motion for summary judgment. R4-46. Godby filed an appeal to the Eleventh Circuit on October 18, 1994. R4-51. On May 30, 1995, the Eleventh Circuit affirmed the District Court's judgment in favor of Electrolux without opinion. On June 20, 1995, Godby filed a Suggestion for Rehearing En Banc, which was denied by the Eleventh Circuit on August 9, 1995. This Petition followed.

B. Statement of Facts

Electrolux submits that this is not the proper forum to argue the facts of this matter. Nonetheless, arguing the facts is all that Godby seems to do in his Petition and the "facts" as set forth by Godby require comment and correction. As has been his practice throughout this litigation, Godby's factual recitation is incomplete and replete with material inaccuracies. Indeed, at various points in his Petition, Godby relies on "evidence" which is simply non-existent in the record.

Rather than dissect Godby's "facts" as Electrolux was compelled to do at both the District Court and the Eleventh Circuit levels, Electrolux instead directs the Court's attention to the District Court's Order granting summary judgment (R4-46) as an independent source discussing the factual background of this case. In addition, the briefs submitted by Electrolux in the District Court (R2-31) and at the Court of Appeals offer a full description of the facts of this case. What follows below is a brief summary of the case addressing some of the more glaring misstatements contained in Godby's Petition.

Godby's Petition attempts to leave the impression that Godby's employment history was stellar and free from disagreement until his wife secretly tape recorded a conversation

with her supervisor in May of 1991.[3] However, the record reflects that as early as February of 1989, Godby was having disputes with his supervisors and was the subject of complaints concerning his performance.

For example, on February 5, 1989, three years prior to his discharge and approximately twenty-seven months prior to the taping incident, Godby sent a memorandum to various Electrolux officers criticizing the Human Resources Director who, according to Godby, "belittled me in the eyes of my department and the Executive Committee." I Godby Dep. Ex. 1. On July 3, 1989, almost two years prior to the secret taping incident, Godby received a 1988-89 performance evaluation in which he was rated "marginal" in the area of "Coordination: Ability to work with others toward common goals and objectives. . ." I Godby Dep. Ex. 3. During this review, which Godby refused to sign, he was rated "competent minus" in the area of "Interpersonal Skills." *Id.* That was not a good evaluation.

Although Godby's 1989-90 performance rating improved to "superior/competent," Godby was still dissatisfied with the amount of his raise. As a result, on August 22, 1990, Godby sent a memo to John Horigan, one of Godby's superiors, complaining

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3. While on maternity leave, Ms. Godby secretly tape recorded a conversation with her supervisor, Richard Luisi, during which Luisi made some tasteless remarks. P. Godby Dep. p. 3, 29, Ex. 1. Although Godby tried to keep the tape recording a secret, Electrolux later learned of the recording and asked for a copy of the recording in order to take appropriate action. Godby refused to let anyone hear the tape. I Godby Dep. p. 69. Electrolux' request for a copy of the tape recording, along with Godby's refusal to turn over a copy of the recording, constitute the alleged "protest" upon which Godby's retaliation claim is based. It should be noted that at the end of her maternity leave Ms. Godby returned to work at Electrolux at her regular salary. P. Godby Dep. pp. 39-40.

that "it is very obvious that my accomplishments over the past years have not received due consideration." I Godby Dep. Exs. 5, 7. On March 22, 1991, Godby wrote another memorandum to Horigan concerning a meeting on the previous day in which Horigan discussed complaints he was receiving about Godby's "lack of urgency in procurement of goods." I Godby Dep. Ex. 11. It is undisputed that these performance problems and interpersonal friction arose well before Godby's alleged "protest."

In addition to the problems mentioned above, there were other occasions prior to the time of the secret tape recording when Godby violated policy, but which the Company did not find out about until after the tape recording. Those incidents included Godby fabricating a memorandum and forging Horigan's signature to it, and charging personal car repairs for his secretary's car to a corporate account. I Godby Dep. pp. 162-163, 165, Exs. 15, 16; Malone Dep. p. 137; Horigan Dep. p. 95, Ex. 11.

Godby's performance problems that existed prior to his wife's secret tape recording continued unabated after the tape recording incident. On October 12, 1991, Godby responded to a preliminary discussion of his 1991 performance evaluation by sending his manager, Horigan, a memorandum stating that "I am not pleased with the merit review I received from you. . . . I think you base your opinion of my skills . . . on negative feedback you hear from apprehensive complainers. . ." and "you are wrong to judge my interpersonal skills negatively." I Godby Dep. Ex. 18. Godby further stated that "You are also incorrect in your opinion of my administration skills. No one can perform this job better than me. To indicate that I fail to undertake projects or meet deadlines is incorrect."[4] *Id.*

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4. Godby's actual review occurred on November 7, 1991. Godby was rated as "marginal" in the areas of "Implementation and Controlling" and "Interpersonal Skills." I Godby Dep. Ex. 17. Although Godby's overall rating

(Cont'd)

On November 25, 1991, Horigan, after learning of the forgery and fabricated memorandum, reprimanded Godby and recommended that Godby's scheduled 3% pay raise be postponed until 1992. Horigan Dep. pp. 95-96. On December 10, 1991, Godby again responded in writing: "I do not appreciate the implication that I created a criminal act against you or this organization;" Godby expressed disappointment that Horigan had "such a supine opinion of [his] character." I Godby Dep. Ex. 17. This belligerent and defensive memorandum was the final straw as far as Godby's employment was concerned. After Horigan received what the District Court aptly described as Godby's "densely-worded memorandum" (R4-46 p. 17), Horigan decided that he had had enough of Godby's antics and decided to discharge him.[5] Horigan Dep. pp. 118-119.

On February 10, 1992, Electrolux notified Godby that his job was being eliminated. I Godby Dep. p. 184; II Godby Dep.

(Cont'd)
was "competent/marginal," he nonetheless received a 3% raise. I Godby Dep. Exs. 17, 21.

5. Godby's defensive reaction to criticism of his job performance continued up to the time of his termination. One such caustic response to criticism of his job performance occurred on January 18, 1992, when he sent a memorandum to Gary Griffin, Electrolux' Vice President for Sales, blaming others for lengthy delays in obtaining marketing materials. I Godby Dep. Ex. 19. Around that same time, Godby drafted a memorandum to Thomas Albani, President of Electrolux, complaining about various perceived slights, including his salary, Horigan's reprimand of him for the forgery, the low rating an outside consulting firm gave his job, and his having been counselled for using the corporate account to pay for repairs on a personal vehicle. Godby stated: "the people who complain about me are the ones that I have noticed to be the *thriftless spenders* in the organization" (emphasis in the original). I Godby Dep. Ex. 20. In the memorandum, Godby suggested that he would resign if Albani agreed with Horigan. I Godby Dep. pp. 180-181. In that document, as well as in all the other Godby memoranda, Godby made no mention of age discrimination, retaliation or of his wife's tape recording.

Ex. 40; Horigan Dep. p. 118. Because this action was treated as a "job elimination," Electrolux was able to pay Godby thirty weeks of severance pay and four weeks of vacation pay, totalling $25,330.00. II Godby Dep. Ex. 40. Had Electrolux chosen to treat Godby's separation as a discharge "for cause," Godby would have been ineligible for severance pay. Malone Dep. p. 162.

Following Godby's discharge, various Electrolux managers gave him reference letters to aid him in his job search. I Godby Dep. Exs. 24, 28. When Godby requested that he be rehired as a sales representative; Electrolux agreed to do so. I Godby Dep. pp. 186-187. Electrolux further offered Godby a $550 per week guarantee, which he turned down. *Id.* p. 189. Godby had poor sales, missed sales meetings, spent a lot of time looking for another job and was ultimately dismissed from the sales job at his request. *Id.* p. 199, Ex. 30. Godby does not challenge Electrolux' decision to discharge him from his sales position.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Godby's age discrimination and retaliation claims because they lack factual support and are based upon speculation and Godby's conclusory allegations. The Eleventh Circuit Court of Appeals correctly affirmed the dismissal. The sole reason now advanced by Godby in support of his Petition is that the lower courts improperly disregarded alleged disputed material facts which, according to Godby, should have precluded summary judgment. The record does not support that contention.

In fact, the record evidence was thoroughly considered and carefully reviewed by the courts below and summary judgment was properly granted. In assessing the merits of Godby's claims, the District Court carefully and painstakingly reviewed the

entire record, ferreting out the many demonstrable misstatements, half-truths and outright fabrications contained in Godby's pleadings. Godby adduced no evidence to support a reasonable inference that he was discharged and subsequently not rehired because he was forty or in retaliation for allegedly "protesting" sex discrimination. Godby's discharge resulted from a series of cumulative incidents, including (1) fabricating a memorandum and forging his manager's signature to it without his manager's knowledge or permission, (2) failing to obtain necessary supplies and materials in a timely fashion, (3) reacting with hostility and belligerence anytime his conduct or performance was questioned, (4) being accused by his secretary of sexual harassment, and (5) charging personal car repairs for his secretary's car on a corporate account. Although the discharge decision was largely performance driven, Electrolux humanely chose to treat the discharge as a job elimination in order to allow Godby the benefit of receiving over twenty-five thousand dollars in severance pay and other Company benefits for which he would have been disqualified had he been discharged for cause.

The Eleventh Circuit, having reviewed the entire record, affirmed the District Court's findings. In both courts, the correct legal standards were applied. The District Court properly applied the summary judgment analysis mandated by *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), and its progeny. In disposing of Godby's age discrimination and retaliation claims, the District Court relied upon this Court's analysis for Title VII and ADEA claims as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981); and *Hicks v. St. Mary's Honor Center*, __ U.S. __, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). The Eleventh Circuit, in subjecting Godby's appeal to *de novo* review, made an independent determination of the District Court's grant of

summary judgment. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1993); *Browning v. Peyton*, 918 F.2d 1516 (11th Cir. 1990).

This case is not suited for Supreme Court review because none of the various "questions" presented by Godby concern conflicting decisions of the various Courts of Appeal or involve important questions of federal law. The decision below is consistent with this Court's precedent as well as that of the other Circuit Courts of Appeal. The case has already been fairly decided by the District Court and affirmed twice by the Court of Appeals; there is no reason for further review by this Court.

REASONS FOR DENYING THE WRIT

I.

GODBY'S PETITION DOES NOT PRESENT A PROPER QUESTION FOR REVIEW.

A review on a writ of certiorari is not a matter of right, but one of judicial discretion. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. None of the various items proposed for review by Godby involve the types of issues that this Court concerns itself with — Godby is not seeking review of a case involving conflicting decisions of the various Courts of Appeal or involving important questions of federal law. Sup. Ct. R. 10.

Rather, Godby's Petition is limited to his attempt to have this Court review the factual findings made by the District Court in granting summary judgment. Godby lists three questions for review by this Court. In reality, all three questions posed by Godby ask the same question: did the District Court fail to note genuine issues of material fact which should have precluded

summary judgment? Stated differently, Godby wants this Court to review the record and pass judgment on the District Court's factual findings and the Eleventh Circuit's affirmance of those findings. This is the only matter proposed by Godby for review, and this Court should decline Godby's invitation.

A petition for a writ of certiorari is rarely granted when the asserted error consists solely of erroneous factual findings. Sup. Ct. R. 10. It is not the place of this Court "to reappraise the evidence unless it plainly fails to support the findings of the trier of facts." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 753, 96 S. Ct. 2337, 2350, 49 L. Ed. 2d 179 (1976). In this case, where a 38-page order was issued which dissects the facts of the case in minute detail, it cannot be said that the evidence fails to support the findings of the District Court as affirmed by the Eleventh Circuit. Godby's Petition should be denied on this basis alone.

II.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON GODBY'S CLAIMS.

Beyond the fact that Godby's Petition fails to present a proper question for review by this Court, the record fully supports the District Court's decision granting summary judgment in favor of Electrolux and the Eleventh Circuit's affirmance of that decision.

A. Godby's Age Claim Was Properly Dismissed.

In disposing of Godby's age discrimination claim, the District Court properly utilized the standards enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); *Texas Dept. of Comm. Affairs v. Burdine*, 450

U.S. 248, 101 S. Ct. 1089 (1981); and *Hicks v. St. Mary's Honor Center*, __ U.S.__, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). R4-46-p. 27. To establish a prima facie case of age discrimination under the *McDonnell Douglas* framework, Godby had to show that (1) he was a member of the protected age group, (2) that adverse employment action was taken against him, (3) that he was replaced by someone from outside the protected age group, and (4) that he was qualified for the position for which he was rejected.[6] *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989). Once Electrolux articulated legitimate business reasons for Godby's termination, Godby had the burden of showing that the reasons articulated for his termination were actually a pretext disguising Electrolux' discriminatory motive. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

The District Court held that Godby had succeeded in creating a material issue of fact with respect to his prima facie case. R4-46-p. 28. Nonetheless, summary judgment was granted because Godby failed to establish an issue of fact as to whether the legitimate business reasons offered by Electrolux for his discharge were pretextual. R4-46-p. 29-34. In his Petition, Godby has apparently elected not to challenge the dismissal of his age claim.[7] Moreover, even if Godby elected to pursue his age claim, his age claim was still properly dismissed. As discussed below with respect to Godby's retaliation claim, Godby failed to create a genuine issue of fact as to pretext.

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6. In Electrolux' view, this case is a job elimination case mandating a different formulation of the *McDonnell Douglas* framework. R2-32-16. Under either framework, however, summary judgment is appropriate on Godby's age claim because he failed to rebut Electrolux' legitimate reasons for discharging him.

7. Godby's age claim is mentioned but not argued in his Petition.

B. Godby's Retaliation Claim Was Properly Dismissed.

In order to establish a prima facie case of retaliation, Godby had to show that: (1) he engaged in protected opposition to Title VII discrimination; (2) an adverse employment action was taken simultaneous with or subsequent to such opposition; and (3) there is a causal link between the protected activity and the adverse employment action. *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600 (11th Cir. 1986); *Perryman v. Johnson Products Co.*, 698 F.2d 1138, 1142 n.8 (11th Cir. 1983).

The District Court found that Godby produced enough evidence to satisfy the first two prongs of a prima facie retaliation claim.[8] Although Electrolux disagrees with that specific finding, the District Court further held that Godby could not establish a causal connection between his "protest" and his discharge some eight months later, and for this reason granted Electrolux summary judgment on Godby's retaliation claim. The District Court further concluded that even if Godby had established a prima facie case, he failed to produce evidence sufficient to create an issue of fact as to whether the reasons articulated by Electrolux for his discharge were pretextual.

The District Court properly held that merely complaining about alleged discrimination followed several months later by an adverse action is insufficient, in itself, to defeat summary judgment. There must be some evidence of a causal link between the alleged protest and the adverse employment action. Where,

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8. Electrolux respectfully disagrees that Godby engaged in conduct protected under Title VII because he never "protested" anything. *See* Brief in Support of Defendant's Motion for Summary Judgment, R2-32, and Brief of Appellee.

as here, evidence of such motivation is lacking, summary judgment is appropriate. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1993). Not only is evidence of causation lacking here, the surrounding circumstances actually disprove any connection between Godby's discharge and his "protest."

1. The eight-month time lapse between the tape recording and Godby's discharge refutes any causal link between the two events.

The timing of Godby's discharge alone disproves the suggestion that his discharge was causally connected to the alleged protest on behalf of his wife. The discharge occurred in February, 1992, approximately eight months after Godby's wife taped Luisi. The passage of a substantial period of time between the alleged protected activity and the adverse employment action is an important consideration in determining whether there is a nexus sufficient to establish a prima facie case of retaliation. *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600 (11th Cir. 1986).

In this instance, where many months elapsed from the time Ms. Godby taped Luisi until the date of Godby's discharge, the required nexus is simply not present. *EEOC v. Fuchs Baking Co.*, 43 FEP Cas. (BNA) 752 (S.D. Fla. 1987) (where one year had passed, plaintiff could not show the required nexus). Courts in other circuits addressing this issue have similarly held that a substantial gap between the protected activity and the adverse action can disprove the required causal nexus. *See, e.g., West v. Fred Wright Constr. Co.*, 756 F.2d 31 (6th Cir. 1985); *Maldanodo v. Metra*, 743 F. Supp. 563 (N.D. Ill. 1990); *Reeves v. Digital Equipment Corp.*, 710 F. Supp. 675 (N.D. Ohio 1989).

The inference of causation is further negated given what happened *after* the taping and before Godby's discharge:

- Charges of sexual harassment were lodged against Godby by his secretary, Junie Julian;

- Godby manufactured a memorandum purporting to be from his manager, Horigan, and then forged Horigan's signature;

- Godby wrote numerous scathing memoranda to various Electrolux managers;

- It came to light that Godby charged Julian's car repairs to a Company account[9];

- Godby was counselled by Horigan for contacting a consulting group which had questioned the utility of Godby's job. I Godby Dep. Ex. 20.

Viewed separately or collectively, these incidents, which are undisputed and arose because of Godby's own conduct, were far closer in time to Godby's discharge than the taping, thus negating the required "retaliatory" causal link.

2. *Retaliation is further disproved by Electrolux' conduct towards Godby following his termination.*

The circumstances surrounding and following Godby's discharge further disprove a retaliatory motive:

- Following his discharge, Godby asked to become a sales representative. The Company granted his request and even went so far as to offer him a $550 per week salary guarantee so that he would not be entirely

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9. Godby subsequently attempted to collect money from Julian for the car repairs *after* she charged him with sexual harassment. Julian Aff. ¶ 2.

dependent on commissions for his income. I Godby Dep. p. 189. Electrolux made this offer at a time when Godby was already being paid his full salary due to the thirty-four weeks of separation pay he received.

- The Company's decision to eliminate Godby's job, rather than discharge him for cause, is also inconsistent with the theory that the Company wanted to retaliate against him. If Electrolux had the punitive motive which Godby seeks to ascribe to it, it would have discharged Godby for cause so he would not receive separation pay. This is equally true of the decision to pay Godby a year-end bonus because the Company met its "cash flow quota" for 1991. Malone Dep. Ex. 9.

- Various Electrolux managers, including the Chief Financial Officer, provided Godby with references which he used liberally in his efforts to secure new employment. I Godby Dep. Exs. 24, 28. One of the reference letters was given to Godby even after he filed his first EEOC charge. I Godby Dep. Ex. 28.

Such behavior is entirely inconsistent with the contention that Electrolux harbored any animus toward Godby. The District Court, in granting Electrolux summary judgment, recognized this fact.

C. Even If Godby Had Established A Prima Facie Case Of Age Discrimination Or Retaliation, Summary Judgment Was Still Appropriate Because Godby Failed To Demonstrate A Genuine Issue Of Fact As To The Issue Of Pretext.

Godby's Petition sets forth eight alleged factual disputes which he claims demonstrate pretext with respect to the reasons

for Godby's termination. These issues have previously been discussed in great detail, both in the District Court and Eleventh Circuit. Nonetheless, out of an abundance of caution, Electrolux will once more briefly respond to each of the points raised by Godby in his Petition.

1. Luisi's comments are undisputed.

Electrolux does not dispute that Luisi made inappropriate remarks to Ms. Godby.[10] Although the "merits" of Ms. Godby's situation are not material to this case, Electrolux makes the following observations with respect to this issue. First, Ms. Godby, who returned to work at Electrolux at the end of her maternity leave, never filed an EEOC charge or sought other formal relief as a result of Luisi's comments. Second, there is no dispute that Luisi, who previously worked in the same office as Ms. Godby, transferred to a different office while Ms. Godby was on leave and that no one was hired to be his secretary upon his relocation. I. Godby Dep. p. 83. Third, if Luisi truly preferred another secretary merely because of Ms. Godby's parenthood, he would not have asked her to return to work early from her leave, as Ms. Godby claims he did on several occasions. P. Godby Dep. pp. 19-20. Finally, the issues in *this* case are alleged retaliation and age discrimination as to Mr. Godby, all other issues are immaterial and, whether they are disputed or not, are insufficient to overcome summary judgment.

2. Godby was told his wife could be sued for secretly tape recording her supervisor.

Electrolux does not dispute that Godby was told his wife's

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10. Electrolux does, however, dispute that "Luisi told Ms. Godby he did not want her working for him now that she had a baby." Godby Petition, p. 9. This blatant mischaracterization of Luisi's comments is a good example of the liberties Godby takes with the record.

clandestine tape recording was illegal. On the other hand, Electrolux categorically denies that Godby was told that Luisi may sue his wife "if she pursues the matter further." Godby Petition, pp. 10, 12. This is perhaps Godby's greatest misstatement to this Court. Not surprisingly, Godby fails to cite any record evidence to support this allegation. Godby cannot cite to the record because no such statement exists; Godby simply made it up.

3. The "interrogation" of Godby consisted of Electrolux attempting to ascertain the veracity of the Godby's allegations concerning Luisi.

Godby argues that the various requests made by Electrolux managers to listen to the tape recording constitute evidence of retaliation. Godby Petition, pp. 10-12. Repeatedly referring to Electrolux' efforts to hear the tape recording as an "interrogation," Godby states that "the extraordinary scrutiny which he encountered as a result of his wife recording Luisi infers (sic) that Electrolux management was very concerned about the Godby's complaint regarding discriminatory conduct." Godby Petition, p. 12.

Although Electrolux questions Godby's depiction of the attempts to hear the tape recording as "interrogation," Electrolux is in full agreement that its managers were deeply and properly concerned about allegations of misconduct on the part of Luisi. Electrolux might have been subject to Title VII liability if it had failed to investigate claims of sex discrimination lodged against one of its managers. The reason that Electrolux wanted to discuss the recording with Godby was because he refused to provide Electrolux with a copy of the tape.[11] Absent

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11. It was not until Godby initiated this lawsuit that a copy of the tape was finally made available to Electrolux.

substantiating proof concerning Luisi's comments, Electrolux had no way to fully investigate and, if necessary, remedy the matter.

Given that Godby was in possession of evidence which could substantiate his wife's allegations against Luisi, it is far from surprising that Electrolux wanted to listen to a copy of the recording, which Godby refused to allow. Far from demonstrating a protest over his wife's treatment, Godby's conduct in refusing to provide evidence of an alleged improper statement by an Electrolux manager bordered on insubordination.

Godby's use of the word "interrogation" in describing Electrolux' attempts to hear the tape is, of course, intended to conjure up images of Gestapo-like coercion. During his two depositions, Godby himself never once described his discussions about the tape as "interrogations." Certainly Godby did not feel particularly "coerced" or "interrogated" in light of his adamant refusal to let anyone hear the tape. The point is simply this — Electrolux asked Godby to let someone listen to the tape so that Electrolux could take appropriate action, and he refused. That is not protected conduct under Title VII.

4. *Godby's final performance evaluation was consistent with his past performance.*

Godby next argues that pretext is established by the fact that his November, 1991 performance evaluation was allegedly a radical departure from a supposed history of outstanding performance at Electrolux. This is yet another gross mischaracterization of the record. As previously discussed, in addition to having a history of performance problems and disputes with his managers dating back to at least February of 1989, Godby received a substandard review in 1989, which he

refused to sign. I Godby Dep. Ex. 3. It could not be clearer that Godby had a disturbing history of sending memoranda expressing dissatisfaction regarding his pay, lack of appreciation, and other perceived slights. I Godby Dep. Exs. 1, 6, 7, 11.

Moreover, other incidents occurred prior to November of 1991 which affected Godby's final review. Electrolux did not find out about the sex harassment complaints about Godby until August 1991. It was not until October/November 1991 that Horigan learned of Godby's forgery. Equally important, Horigan did not become Godby's immediate supervisor until August, 1990. Different supervisors frequently view similar conduct in dissimilar fashion; it appears Horigan may have been less willing than some of Godby's previous supervisors to tolerate Godby's performance/conduct problems, which worsened over time.[12]

5. The reasons given by Electrolux for Godby's discharge did not shift and were not inconsistent.

Godby argues that pretext is shown by Electrolux' alleged "shifting explanations" for his termination. Godby says that Electrolux changed its position three times with respect to the articulated reasons for his discharge, going from "economic reasons to performance-related reasons to 'had enough' with Godby." Godby Petition, p. 19. Godby's attempt to portray as

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12. Godby points to his 3% raise in November of 1991 as evidence of pretext. However, there was nothing about the granting of a raise that would suggest pretext. The raise Godby received in November of 1991 was less than the raise Godby had complained about the preceding year. I Godby Dep. Ex. 7. Moreover, after learning of the falsified memorandum and forgery, Horigan postponed the raise, and that was before Horigan received Godby's December 10, 1991 rebuttal memorandum which, in Horigan's words, "was the straw that broke the camel's back." Horigan Dep. p. 121.

"shifting" Electrolux' reasons for firing him is simply another Godby misstatement of the record.

Godby does not dispute that any of the performance/conduct reasons which led to his termination occurred. Electrolux has already explained the "Godby-friendly" reasons why Godby's termination was called a job elimination, rather than a discharge for cause.[13] More important, there is no dispute that Godby's job was in fact eliminated and that cost savings were achieved.

Electrolux did not suddenly change its position regarding the reasons for Godby's termination in its motion for summary judgment, as Godby claims. Godby Petition, p. 18. That claim is categorically and demonstrably false, and Godby knows it is false because he made the same misrepresentation in both the District Court and Court of Appeals, which Electrolux pointed out. R3-34-p. 54. The undisputed facts, as noted by the District Judge, are that Electrolux expressly referred to Godby's performance and conduct problems in its EEOC response.[14]

Godby's assertion that Horigan's statement that he finally "had enough" of Godby's antics somehow represents a switch

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13. Godby also cites the various letters of recommendation as evidence of pretext. Like several of Godby's arguments, this one illustrates the old adage "no good deed goes unpunished." Obviously after twenty years, Godby had friends who wanted to help him move on. Moreover, the letters refer only to Godby's ability to cut costs; they say nothing that is inconsistent with the reasons that Electrolux has articulated for eliminating his position. I Godby Dep. Ex. 24, 28. Neither is paying Godby a year-end bonus based on the Company's having met its 1991 goals, nor rehiring Godby with an offer of a guaranteed salary, evidence that Electrolux wanted to retaliate against Godby. Malone Dep. Ex. 9.

14. Godby's conduct and performance problems were discussed for three pages in Malone's affidavit submitted to the EEOC. Malone Dep. Ex. 4.

from the performance/conduct related reasons articulated for Godby's discharge is puzzling. Horigan finally "had enough" of Godby precisely because he was tired of dealing with Godby's performance/conduct problems. To suggest that this represents a shifting reason for Godby's termination is, at best, nonsensical.

6. Godby's harassment of his secretary does not reflect pretext.

Godby makes two arguments with respect to the charge of sex harassment lodged against him by his secretary, Junie Julian, and the investigation that ensued. First, Godby argues pretext is shown because another Electrolux employee accused of sex harassment, Larry Perryman, was allegedly treated more favorably than Godby in that Perryman was only disciplined and not discharged as Godby was. Then Godby argues that pretext is shown because he was not disciplined by Electrolux as a result of his secretary's allegations.

Godby's attempt to compare himself with Perryman fails for a number of reasons, the most fundamental of which is that Godby was not similarly situated to Perryman. In making this argument, Godby ignores the cumulative effect of his performance and conduct problems. Perryman did not falsify a memorandum and then forge his manager's signature; Perryman did not repeatedly respond defensively and with belligerence to any type of criticism or counselling. As such, Perryman's alleged situation offers no evidence of pretext since Perryman is not similarly situated. *Mitchell v. Toledo Hospital,* 964 F.2d 577, 583-84 (6th Cir. 1992).

Electrolux agrees that it did not formally discipline Godby as a result of Julian's allegation. Rather, Julian was permitted to transfer away from Godby. However, there is no dispute that the matter was investigated and that Godby was spoken to regarding

the incident. Moreover, a number of Julian's allegations came to light *after* the initial investigation. Godby acknowledges that he was subsequently spoken to about the mysterious disappearance of various personal items belonging to Julian from Julian's desk and about Godby's unauthorized charging of Julian's car repairs to the Electrolux corporate account. I Godby Dep. pp. 147, 149.

The critical point about the sexual harassment charges against Godby is this — if Electrolux had chosen to believe Julian's accusations and disbelieve Godby's denials, it could have fired Godby on the spot. That Electrolux choose not to do so in fact disproves pretext.

7. Horigan's delay in discussing the forged memorandum with Godby does not suggest pretext.

Godby's argument that Electrolux waited six months from the discovery of the forgery until using it to justify his discharge (Godby Petition, p. 26) holds no water for a number of reasons. First, as held by the District Court, *Horigan* did not actually learn of the forged memorandum until October or November, 1991. R4-46-pp. 16-17 n. 10. Godby himself expressly acknowledged this fact in the District Court. R3-34-p. 40.

Secondly, that Horigan did not immediately bolt down to Godby's office to fire him on the spot again disproves pretext. If, as alleged by Godby, Horigan had been looking for a chance to retaliate against Godby, that would have been a golden opportunity. The fact that Horigan did not instantaneously reprimand Godby about the forgery further demonstrates that Horigan was not "out to get" Godby.[15]

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15. Although Godby states that the forgery was not mentioned in his November, 1991 review, it is undisputed that as a result of the forgery, Horigan decided on November 25, 1991 that Godby's annual raise should be postponed. Horigan Dep. Ex. 11.

Finally, as stated by the District Court, there is nothing suspicious about the relatively short time lag between Horigan's discovery in October/November 1991 of the forged memorandum and his confrontation of Godby in light of Horigan's status as a senior executive for a large corporation. R4-46-p. 30. Stated differently, there was more to Horigan's job than just dealing with Godby, although dealing with Godby's behavior and compulsive memo-writing was beginning to take up more and more of Horigan's time.

8. The elimination of Godby's job does not suggest pretext.

Godby's final pretext argument is that Electrolux failed to show why it selected Godby's position for elimination, as compared to any other position in the Company. This argument, raised for the first time in this Petition, is particularly desperate. Godby apparently believes Electrolux bears the burden of justifying why Godby's position, as opposed to some other position, was selected for elimination. The answer to why Electrolux eliminated Godby's position is because Godby was in it. Since Electrolux had decided to dismiss Godby, it *had* to be Godby's position which was eliminated (as opposed to outright firing Godby for cause) if Godby was going to collect severance pay.

CONCLUSION

Godby's Petition for Writ of Certiorari should be denied. The Eleventh Circuit's affirmance of the District Court's decision is not in conflict with that of any other Circuit, nor do the issues at hand involve important questions of federal law that should be settled by this Court. This case is a straightforward employment discrimination lawsuit, one which was dismissed because it lacked factual support. The resources of the Court should not be wasted on this case any more than they already have and the Petition should be denied.

Respectfully submitted,

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No. 95-1123

In The

Supreme Court of the United States

October Term, 1995

JERRY GODBY,
Petitioner

vs.

ELECTROLUX CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court and Court of Appeals' granting of summary judgment to Respondent directly conflicts with the Supreme Court's decision in St. Mary's Honor Center v. Hicks, ____ U.S. ____, 113 S.Ct. 2742 (1993) made credibility determinations and drew improper inferences on material and disputed factual issues in favor of the Respondent and therefore improperly granted summary judgment; and

2. Whether the shifting and inconsistent reasons articulated by Respondent for Petitioner's termination create genuine issues of material fact which preclude summary judgment under St. Mary's Honor Center v. Hicks, supra.

3. Whether Respondent Electrolux waited seven months to fire Petitioner / Appellant for his protest against the illegal acts of a company officer because the company feared a lawsuit was imminent from Petitioner's wife if they acted sooner.

LIST OF PARTIES

Pursuant to Rule 14 of the Supreme Court Rules, Petitioner hereby submits a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this litigation, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to the parties.

a. Steven D. Cooper, Esq., Attorney for Respondent
b. Electrolux Corporation, Respondent
c. Orinda D. Evans, Judge, United States District Court
d. Jerry Godby, Petitioner
e. Gary R. Kessler, former Attorney for Petitioner
f. Christopher E. Parker, former Attorney for Petitioner
g. Marc A. Taylor, Attorney for Respondent
h. John F. Wymer, III, Attorney for Respondent
i. Kathleen A. Wasch, Attorney for Respondent

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STATUTORY PROVISIONS INVOLVED

Rule 56 of the Federal Rules of Civil Procedure

Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§§ 2000e, et seq.

The Age Discrimination in Emp oyment Act, 29 U.S.C.

§§ 621, et seq.

28 U.S.C. § 1331

RULES CITED

Supreme Court Rule 10 1

Federal Rules of Civil Procedure 56 7

(1) Electrolux Claims Godby's Petition Does Not Present A Proper Question For Review (Respondent's brief in Opposition. p. 9)

Respondent Electrolux contends that a review for writ of certiorari is not a matter of right, but one of judicial discretion. Godby apologizes to the court for having to bring this matter before such a high authority, but submits that he has legitimate grounds for filing his petition, whereby jurisdiction is pursuant to federal question jurisdiction under 28 U.S.C. § 1331. In his petition Godby has questioned whether the District Court and Court of Appeals' granting of summary judgment to Respondent is in direct conflict with the Supreme Court's decision in St Mary's Honor Center v. Hicks, ___U.S.___, 113 S.Ct. 2742 (1993), whether the District Court and the Court of Appeals made credibility determinations and drew improper inferences on material and disputed factual issues in favor of the Respondent and therefore improperly granted summary judgment; and whether the shifting and inconsistent reasons articulated by Respondent for Petitioner's termination creates genuine issues of material fact which preclude summary judgment under St. Mary's Honor Center v. Hicks, supra. Godby is therefore seeking a review of a case involving conflicting decisions. Sup.Ct. R. 10.

(2) Electrolux Plays Down Godby's Protest Of Discrimination (Respondent's Brief in Opposition p. 4)

Electrolux states; ***"Electrolux' request for a copy of the tape recording, along with Godby's refusal to turn over a copy of the tape recording, constitute the alleged "protest" upon which Godby's retaliation claim is based. It should be noted that at the end of her maternity leave Ms. Godby returned to work at Electrolux at her regular salary."***

These comments by Electrolux are profoundly incorrect. It is documented that Ms. Godby came back to work from her maternity leave to a clearly inferior position .(White Dep., p. 40-

41). Although she kept the same salary in her new lower grade position Ms Godby's salary was now range maximized 'frozen'. The documented evidence proves that both Jerry and Patrice Godby spoke to key officials.[1] regarding her pregnancy discrimination.

(3) Electrolux States Godby Relies On Evidence That Is Non-Existent In The Record (Respondent's Brief pp.3,4)

Godby submits that the evidence presented by him is Electrolux' own documented records that summarize his 21 years career in minute detail. Electrolux cannot dispute its own entries into Godby's personnel file. Through out this litigation Electrolux has provided shifting reasons for Godbys termination and each time he has simply pointed to his personnel file as evidence that there was no problem with his performance in 21 years until he reported and protested the discriminatory conduct of a company Vice President.

In an attempt to its show bad performance prior to Godby's protest Electrolux points to Godby's 1988-89 performance evaluation, claiming it was substandard and further claiming that he refused to sign it. Respondent states in its Brief p.4.,***"That was not a good evaluation"*** First, Godby absolutely did not refuse to sign the document. Second, there is not one unsatisfactory mark on the appraisal (I Godby Dep.p.28). In reviewing the managers signature on the appraisal (see footnote on p. 4), it becomes apparent why Godby didn't sign the document. Godby's boss Stinger did not tender a formal

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1 Upon hearing of Luisi's discriminatory actions toward Godby's wife from Godby, White, Electrolux' Southeast Area Administrator, was concerned that Luisi's actions were discriminatory and brought the issue to the attention of his (White's) immediate superiors. (White Dep., pp. 23-24). White's superiors, Clark and Campbell, agreed with White's assessment of the situation. (White Dep., p.26). White also informed Clark and Campbell that Jerry Godby mentioned that there was taped conversation between Luisi and Mrs. Godby regarding the discrimination. (White Dep., p.31). White informed Clark and Campbell that Mrs. Godby felt she was being discriminated against by Electrolux and Luisi because she had a baby. (White Dep., p 38). Clark and Campbell then discussed the pregnancy discrimination issues with Charles Malone, Electrolux' Vice President of Human Resources. (White Dep., p.27)

evaluation to Godby for this period. Another subordinate of Stinger, Debra Novak, signed his (Stingers) name to the document and simply gave Godby a copy of it. Godby submits he was never asked to sign or comment on it. (Appraisal Below) [2](I Godby Dep.p. 28)

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2 **ANNUAL PERFORMANCE EVALUATION**

NAME *Jerry Godby* DEPARTMENT *Office Services* DATE _____

POSITION TITLE _____ YEARS IN POSITION _____ DATE HIRED *2/17/70*

PERIOD COVERED BY REVIEW: FROM *3/88* TO *3/89*

RATINGS: O-Outstanding S-Superior C-Competent M-Marginal U-Unsatisfactory

Professional Knowledge: Stays abreast of current trends and changes in the technical / professional / administrative areas related to the job. Working knowledge of all phases of the job and the various techniques and skills necessary for efficient completion of tasks.	S
Coordination: Ability to work with others toward common goals and objectives; expresses individual viewpoint while also acknowledging and learning form others. Shares responsibility and credit with the team.	M
Implementation and Controlling: Ability to undertake projects and meet or exceed deadlines; anticipates project needs / changes and meets new priorities; effectively measures project progress, take correct action as needed and follows up until completed with proper sense of urgency.	C
Decisiveness: Readiness and willingness to make decisions, render judgements, initiate actions, and commit oneself to those decisions.	C
Planning and Organizing: Establishes appropriate course of action for self and subordinates to accomplish goals; makes proper assessment of personnel and appropriate use of resources; sets realistic target dates.	C
Procedures and Policies: Properly interprets and applies Electrolux policies and procedures to job responsibilities, supports AAP/EEO policies.	C
Interpersonal Skills: Ability to perceive and react to the needs of others with appropriate sensitivity and firmness	C-

(continued...)

(4) Electrolux Claims Godby's Performance Was Deficient Prior To His Protest. (Respondent's brief in Opposition pp.4,5,6,20) Electrolux states that Godby does not dispute any of the performance/ conduct reasons mentioned by Electrolux in this litigation. Godby has throughout this litigation done nothing but dispute their *ever changing* claims. With respect to Godby's defensive reaction to criticism, Electrolux is painting a picture for the court that is astronomically incomplete and misleading. Electrolux' own records prove that during the same time period that it alleges Godby performed in an unacceptable manner, pointing to his memos regarding *concern over salary and response to criticism*, the company generously rewarded

(...continued)

Verbal communication: Effectiveness of expression in individual and group situation(including listening, non-verbal communication and appropriate language).	C
Written Communication: Ability to express ideas clearly and concisely in good grammatical form. Concise and complete written reports that fully detail the assignment.	C
Judgement: Reviews data in a logical, sequential manner and draws sound conclusions.	C
Results Orientation: Effective in getting ideas accepted in delegating effectively and achieving the desired outcome in a timely and professional manner.	C
Innovation: Develops sound, creative alternatives to solving problems. Probes job responsibilities to find a "better way."	C

OVERALL PERFORMANCE RATING C

S\ F. STINGER (DSN) _____
Rating Supervisor / Manager **Date**

Performance evaluation discussed on 7/3/89 **with** _____
Date **Emp.Signature**

S\ Debra S. Novak 7/3/89
Human Resources **Date**

COMPETENT.....Meets the job requirements. The contribution to the department and company is that expected of a fully qualified and experienced employee. Satisfactorily performs all important job skills and objectives.

his accomplishments by providing him significant increases in his salary and job responsibilities including promotions. This truth can not be disputed by Electrolux in that it exists in Godby's irrefutable Employment Performance File, the entries of which were created by company Managers, not Godby. Godby points out that Electrolux' own President / CEO disputes this testimony of ***'unacceptable performance prior to Godby's protest'*** in his October 1991 entry into Godby's Employment File. This letter[3] proves that Electrolux did not have a problem with Godby's performance prior to his protest of July, August, September 1991. The President / CEO commends Godby for a Job Well Done. Simply put, Godby's expressions of concern over Horigan's unprecedented criticism and his formal concerns over a low salary increase were acceptable interactions with Godby until this litigation. Indeed, the only difference in Electrolux' normal interactions with Godby were his complaints of unlawful discrimination.

(5) Electrolux Accuses Godby of Outright Fabrications (Respondents Brief in Opposition p. 8)

Godby's testimony to the court can be substantiated by written and recorded evidence in Electrolux' own Employment File on Godby, the entries of which were written and submitted by an array of Managers, Directors and VPs over a period of twenty one (21) years.

Electrolux states; ***"Godby adduced no evidence to support a reasonable inference that he was discharged and subsequently not rehired because he was forty or in retaliation for allegedly `protesting' sex discrimination."***

It is undisputed that Godby was over 40 years of age at the time of his

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Your commitment, loyalty and dedication are attributes that contribute to the success of the Electrolux Corporation. We are proud to have a person with your special status on our team....

Please accept our congratulations on a job well done and our thank you for your continued support...

Very Sincerely

S\ Thomas J. Albani , President and C.E.O October 13, 1991

discharge and that he openly and vigorously opposed the illegal discriminatory treatment afforded his wife, another Electrolux employee, prior to his termination. Godby brought forth the age claim due to the preponderance of concerns regarding his length of service vs. his responsibilities and salary which Electrolux unknowingly confirms in its Interrogatory No.2.. (I Godby Dep. p. 205).

(6) Electrolux Claims Godby Terminated For Performance (Respondents Brief in Opposition pp. 8,20,23)

Electrolux' proffered reasons for Godby's discharge have been based on either financial or performance reasons, depending on who made the statement. Electrolux submitted the affidavit of Charles Malone in response to Godby's EEOC claim. In his sworn affidavit, Malone states only one (1) basis for Godby's termination; ***"Godby's position was eliminated in a further effort to reduce the overhead cost to the business."*** However in its brief in opposition on p.23 Electrolux disputes this sworn testimony by venomously stating... ***"The answer to why Electrolux eliminated Godby's position is because Godby was in it."*** Godby's performance was absolutely not mentioned as a reason for his dismissal in the EEOC response. In Electrolux' first response to the District Court it lists four (4) reasons for Godby's termination. (Defendant's Interrogatory No.2) Then, in its Brief in Support of Summary Judgement Electrolux lists two (2) new reasons, with two (2) prior ones omitted. A new alleged reason is an auto repair charged to a corporate account for a subordinate, bringing the total to five (5) reasons for Godby's discharge. In Defendants Interrogatory No.1 [4], Electrolux states that the company did not know of the matter until --after-- Godby' discharge.

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4 **Interrogatory No. 1. Electrolux' Response**

Since the time of Plaintiff's discharge, defendant has become aware that Plaintiff .... used a company account to make a personal, non-business purchase for a subordinate.....

Godby submits that he allowed his secretary to have her car repaired at Goodyear to afford her the opportunity to pay for the repair after payday when the bill came in. This is the same courtesy that the previous Manager had afforded Godby and others.(I Godby Dep.,p140) There was no company policy regarding the subject. Horigan was aware of this matter and did not see a problem with it as long as the bill got paid. When the secretary did not pay the bill Godby paid it to honor his commitment. (I Godby Dep. p.139, 147)

(7) Electrolux Contends Summary Judgment Is Appropriate (Respondent's Brief in Opposition, pp. 10, 20, 21,)

Godby disagrees with Respondent. In deciding a motion for summary judgment it is not the court's function to decide issues of material fact, but simply to determine whether such issues exist to be tried. Anderson v. Liberty Lobby, 477 U.S. at 249. The Supreme Court has explicitly recognized that discrimination cases present difficult issues for the trier-of-fact regarding the employer's mental process and motivation, thereby making summary judgment generally inappropriate. .,U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 716, 103 S.Ct. 1478,1482 (1983). Indeed, this Court has recognized that the existence of any material factual issues or reasonable inferences upon which a jury draw different conclusions, render summary judgment inappropriate. Hairston v. Gainesville Sun Publishing Co., 9F.3d 913 (11th Cir. 1993). The record in this case presents significant factual disputes-- including many disputes between the Defendants' own witnesses -- which make summary judgment inappropriate. There is more than ample evidence within the record which would allow a jury to return a verdict in favor of Godby. In reviewing the District Court's order granting summary judgment, this Court is to apply the same summary judgment standard as applied by the Court below. Miranda v. B&B Cash Grocery Store. Inc.,975 F.2d 1518 (11th Cir. 1992). The court must determine whether there exist any genuine issues of material fact. (Celotex Corp. v. Caterett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53 1986; Barnew v. Southwest Forest Industries, 814 f.2d 607,609 (11th Cir. 1987); F.R.Civ.P.56(c). The function of the Court at the summary judgment stage is not to weigh the evidence and determine the truth of the matters alleged, but rather to determine whether there are genuine disputes properly reserved for a finder of fact. Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S.Ct. 2505,2511 (1986). If the determination of any factual issue relies upon the credibility of the witness, summary judgment is inappropriate. St Mary's Honor Center v. Hicks, __U.S.__, 113 S.Ct. 2742 (1993) (the credibility of the defendant's proffered reasons in an employment discrimination case is a question for a fact-finder). See also U.S. v. Diebold, Inc., 369 U.S. 654,655(1992); Welch v.Celotex Corp.,951F.2d 1235,1237(11th Cir1992)

Godby has pointed out to this court Electrolux' illusive manner of presenting facts. By providing only part of the facts and leaving out "the rest of the story" the court may not draw proper conclusions.

Respondent states in its brief on p.18.."***Godby's conduct in refusing to provide evidence of an alleged improper statement by an Electrolux manager bordered on insubordination.***" Electrolux must not overlook the fact that Godby was told the tape was illegal and he may be sued by Luisi. Besides, Title VII protection is not limited to tape recorded evidence. Electrolux also claimed on p.18...that ***"Godby's use of the word "interrogation" in describing Electrolux' attempt to hear the tape is, of course, intended to conjure up images of Gestapo-like coercion.*** Godby responds that only Malone asked for the tape, everyone else questioned his involvement with hostility as though Luisi was the victim instead ofMs.Godby. Horigan,Godby's boss raves..."***Your Fucking Stupid to tape an officer of the company.***"(I Godby Dep.p.63)

Godby now points to Respondents brief pp. 21, 22. Electrolux states.. "***Electrolux agrees that it did not formally discipline Godby as a result of Julian's allegations.***" In reading the District Court Order, it is apparent the Judge was led to believe Godby received disciplinary counseling in the matter, which Electrolux now disputes. A finder of fact would surely ask ***'why not?'*** to Electrolux' statement above, given that it asserts this alleged conduct as a primary basis for Godby's discharge. Electrolux further states.." ***If Electrolux had chosen to believe Julian's accusations and disbelieve Godby's denials, it could have fired Godby on the spot, that it did not do so disproves pretext.***" On the contrary, these statements only prove Electrolux did not have a performance problem with Godby regarding Julian's allegations as Godby has stated all along and the District Judge was misled.

Electrolux' own Employment History File on Godby establishes that it did not confront him with any performance issues whatsoever until Horigan's Nov. 27, 1991 showdown regarding the alleged "forgery" a matter that Horigan states he was made aware of Aug.1991 by Julian. (Horigan Dep, pp. 86-87); (Novak Dep.,p. 23), but didn't confront

Godby with his concern until three months later. Godby wrote the memo[5] after a meeting with Hoigan regarding personal phone calls, thinking that a memo on the bulletin board from Horigan would re-enforce the effort. Godby never did distribute or post it since Horigan had not reviewed it.(I Godby Dep.pp.113,114,115). The memo was placed in his desk and obviously removed by an unauthorized person.

(8) Electrolux Claims There Is No Casual Link (Respondents Brief in Opposition p.13)

Electrolux claims that since Ms. Godby did not file an EEOC charge or pursue formal relief that her situation has no merit. Godby responds that the reason Ms. Godby didn't pursue formal relief in Luisi's' discrimination against her was because the Godby's were threatened with a Luisi lawsuit. Godby will testify under oath that he did receive threats from Malone, Electrolux VP of Human Resources and Cooper, Electrolux VP and General Counsel. (I Godby Dep. p. 65, 80). Since the District Court found Godby to have satisfied the first two prongs of his *prima facia* case of retaliation his burden in establishing the final prong is best stated as follows:

[t]he causal link in the [retaliatory discharge] formula [is not] the sort of logical connection that would justify a prescription that the protected participation in fact prompted the adverse action. Such a connection would rise to the level of direct evidence of discrimination, shifting the burden of persuasion to the defendant. Rather, we construed the 'causal link' element to require merely that the plaintiff established that the protected activity and the adverse action were not wholly unrelated. Simmons v Camden Board of Ed.,757 F.2d 1187, 1189 (11th Cir.), cert. denied, 474 U.S. 981, 106 S.Ct. 385 (1985) . See also

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5 To: Jerry Godby Date: May 16, 1991
In a previous conversation and by way of memoranda I requested you curtail personal phone calls in your area. It is apparent there has been a failure on your part to convey company policy concerning telephone usage to your department.
I expect you to resolve this situation immediately. You will not receive another warning.
S/ John Horigan

Hairston v. Gainesville Sun Publishing Co.,9 F.3d at 919; EEOC v Reichhold Chemicals, Inc.,988 F.2d 1564, 1571-72(11th Cir. 1993);Weaver v Casa Gassardo, 922 F.2d 1515 (11th Cir. 1991).

Electrolux was well aware that Ms. Godby had 180 days to submit her discrimination claim to the EEOC. This knowledge was brought forth when Electrolux responded to Godby lawsuit. (See Answer of Defendant Electrolux Corporation, p.1) Cooper is quick to state that Godby's claims are time barred regarding Ms.Godby. Given that Godby was protesting Luisi's blatant discrimination against his wife--rather than an unrelated employee--Godby asserts that it is proper to consider the statute of limitations (180 days) in determining the third prong of his *prima facia* case of retaliation. Indeed, Electrolux did not fire Godby earlier than February 1992 because it feared a lawsuit was eminent from Godby's wife if they acted sooner.

Conclusion

Godby sincerely hopes and prays that the Supreme Court will see through the deceptive wording used by Electrolux in its brief to cover the truth. Godby does not want special favors, but only for this Highest Court in the land to please review his petition openly. When read against the background of St. Mary's Honor Center v. Hicks, U.S. __, 113 S. Ct. 2742 (1993) and Sweat v. Miller Brewing Co., 708 F. 2d 655 (11th Cir.1983), it is clear that summary judgment was inappropriate in this matter. Godby hopes the Supreme Court of the United States will see that justice has not prevailed and will agree that Godby deserves his day in court.

This 9th day of March,1996.

Respectfully submitted.

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